No. 73-1773

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
MAY 25 1974
MICHAEL RODAK, JR., CLERK

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
HARRIET S. SHAPIRO,
Assistant to the Solicitor General,
ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
HAROLD C. NYSTROM,
Associate Solicitor of Labor,
BOBBYE D. SPEARS,
SOPHIA P. PETTERS,
WILLIAM H. BERGER,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutory and collective bargaining agreement provisions involved	2
Statement	4
Reasons for granting the writ	7
Conclusion	15
Appendix A	1A
Appendix B	19A
Appendix C	20A

CITATIONS

Cases:

Accardi v. *Pennsylvania R. Co.*, 383 U.S. 225 — 9, 10, 11, 12, 13

Austin v. *Sears, Roebuck & Co.*, (C.D. Calif.), No. 73-202-FW, decided May 25, 1973, appeal pending, No. 73-2704 (C.A. 9) — 8

Eagar v. *Magma Copper Co.*, 389 U.S. 323 — 9, 10, 11, 12

Ewert v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128 — 6, 7

Ewert v. *Wrought Washer Mfg. Co.*, 335 F. Supp. 512 — 7

Fees v. *Bethlehem Steel Corp.*, 335 F. Supp. 487 — 8

Fishgold v. *Sullivan Drydock & Repair Corporation*, 328 U.S. 275 — 13

547-929—74——1

Cases—Continued Page

Howard v. *Babcock & Wilcox* (N.D. Ohio), No. C 72–966, decided February 1, 1974, notice of appeal filed, March 6, 1974 (C.A. 6) 8

Kasmeier v. *Chicago, Rock Island and Pacific R. Co.*, 437 F. 2d 151 7

Kelly v. *Chicago, Rock Island & Pac. R. Co.*, 293 F. Supp. 423 8

Lipani v. *Bohack Corp.*, 368 F. Supp. 282, appeal pending, No. 74–1471 (C.A. 2) 8

Locaynia v. *American Airlines, Inc.*, 457 F. 2d 1253, certiorari denied, 409 U.S. 982 ..... 6, 7

Messina v. *Consolidated Freightways Corp.*, 315 F. Supp. 340 8

Palmarozzo v. *Coca-Cola Bottling Co. of New York*, 490 F. 2d 586, petition for a writ of certiorari pending, No. 73–1369 ..... 11, 13

Tilton v. *Missouri Pacific R. Co.*, 376 U.S. 169 13

Travis v. *Schwartz Mfg. Co.*, 216 F. 2d 448 14

Tuttle v. *U.S. Plywood Corp.*, 293 F. Supp. 401 8

Young v. *Southern Pacific Transp. Co.*, No. 73–444–RJK, decided September 24, 1973 (C.D. Cal.) 8

Statute:

Military Selective Service Act, 62 Stat. 614, as amended:

50 U.S.C. App. 459 ..... 2, 5, 9

50 U.S.C. App. 459(c)(1) 10

50 U.S.C. App. 459(c)(2) 5, 10

50 U.S.C. App. 459(d) 1

Miscellaneous:

"Paid Vacation and Holiday Provisions," Bulletin No. 1425–9, U.S. Dept. of Labor, Bureau of Labor Statistics, June 1969, p. iii 5

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of Earl R. Foster, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 490 F. 2d 55 and is printed as Appendix A, *infra*. The opinion and order of the district court, not officially reported, is printed as Appendix C, *infra*.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on December 26, 1973. The time

[1] The government is representing Mr. Foster in this litigation pursuant to 50 U.S.C. App. 459(d).

for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to and including May 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether vacation benefits based on the performance of certain minimum work requirements for the employer during the preceding year are perquisites of seniority to which a returning veteran is entitled under Section 9 of the Military Selective Service Act, 50 U.S.C. App. 459; and, if not, whether the veteran is in any event entitled under the Act to a pro rata vacation benefit based on his work for the employer before and after his military service for which vacation benefits would not otherwise be received from the employer.

STATUTORY AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:

* * * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *—
>
> * * * * *
>
> (B) if such position was in the employ of a private employer, such person shall—

> (i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay; or
>
> * * * * *
>
> (c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

The collective bargaining agreement provides in relevant part (Joint Appendix[2] in the court of appeals, 54b):

---

[2] Hereafter "J.A."

Article XIV, "Vacations."

Section 2 provides:

> In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31sts and has seniority on the current December 31st must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st. However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this Section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked twenty-five (25) weeks or more.

STATEMENT

Earl A. Foster was employed by the Dravo Corporation in August 1965. He worked for the company until he entered the military service on March 6, 1967. Upon completing his military obligation, he was reinstated on October 7, 1968, and worked 13 weeks during the balance of 1968. The company refused to give Foster a paid vacation in either 1968 or 1969, contending that he was not entitled to vacation benefits in those years since he had not met the eligibility provisions in the applicable collective bargaining agreement. The agreement provided that only employees with earnings from the company in at least 25 weeks of the preceding calendar year were entitled to benefits (App. A, *infra*, p. 2A).[2] Such provisions are common in collective bargaining agreements.[4]

Petitioner filed suit in the district court alleging that the company violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459, by refusing to consider his military service in computing his entitlement to vacations after he returned to civilian work. The gravamen of his complaint was that under the collective bargaining agreement, vacation benefits were a perquisite of seniority since they accrued automatically to those employed by the company, rather than being in the nature of extra pay for work performed, and thus, on his return to his civilian employment, his eligibility for vacation benefits was to be computed "as * * * if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).

---

[2] The courts below refer to petitioner's claim for paid vacation benefits for 1967 and 1968 (App. A, *infra*, p. 1A; App. C, *infra*, p. 20A). The "1967 benefits" are those available for use in 1968, while "1968 benefits" are to be used in 1969. Thus, petitioner received no paid vacation from his return in October 1968 until 1970, when his "1969 benefits" became available. He was paid his "1966 benefits" when he entered military service in March 1967 (J. A. 11).

[4] A survey of "virtually all agreements in the United States covering one thousand workers or more, exclusive of railroads, airlines, and government agreements" ("Paid Vacation and Holiday Provisions," Bulletin No. 1425–9, U.S. Dept. of Labor, Bureau of Labor Statistics, June 1969, p. iii) showed that almost 70% of such agreements required a specified minimum time, or percentage of available time, to be worked in the previous year as a condition of eligibility for vacations. *Id.* at 23.

After reviewing the collective bargaining agreement, the district court rejected petitioner's argument and held that he had not been denied any rights under the Act (App. C, *infra*, p. 21A).

On appeal, the court of appeals noted that at least two other circuits, the Ninth[5] and the Seventh,[6] had held that vacation benefits under similar collective bargaining agreements are a perquisite of seniority to which returning veterans are entitled.

The court stated that it was necessary to analyze the particular terms of each collective bargaining agreement to determine whether the parties intended that the benefits accrue automatically with employment and thus are seniority rights protected by the Act, or are in fact a form of deferred pay for actual work performed and thus are payable only to those who have performed the work. However, the court further stated that it was more reasonable to consider vacation pay "part of a worker's current or short term return for labor" (App. A, *infra*, p. 15A), while the seniority protected by the Act is only "a priority factor that normally serves to protect workers' long term interest in job security by determining preference in such matters as advancements, layoffs and rehiring" (App. A, *infra*, p. 15A). Although the court recognized that the contract language was ambiguous, it resolved the ambiguities against the veteran and held, "the terms of this collective bargaining agreement require twenty-five full work weeks, and Foster's failure substantially

[5] *Locaynia* v. *American Airlines, Inc.*, 457 F.2d 1253 (C. A. 9), certiorari denied, 409 U S 982.

[6] *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F.2d 128 (C.A. 7).

to comply in this case precludes his claim to full vacation benefit [footnotes omitted]" (App. A, *infra*, p. 17A). The court remanded the case, however, for the district court to consider whether petitioner was entitled under the collective bargaining agreement to a pro rata share of paid vacation benefits for the weeks he worked in 1967 and 1968, if the district court found that issue had been properly raised.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals, although in accord with the result reached by the Tenth Circuit in a similar case,[7] is in conflict—as the court below recognized—with recent decisions of the Ninth and Seventh Circuits. *Locaynia* v. *American Airlines*, 457 F. 2d 1253 (C.A. 9), certiorari denied, 409 U.S. 982; *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128 (C.A. 7).[8] Since the question of returning veterans' entitlement to paid vacation benefits under collective bargaining agreements similar to the one here

[7] *Kasmeier* v. *Chicago, Rock Island and Pacific R. Co.*, 457 F.2d 151 (C.A. 10).

[8] The court's suggestion (App. A, *infra*, pp. 11A–12A) that these cases might be distinguishable on the basis of differences in the terms of the collective bargaining agreements involved is unpersuasive. The agreements in both *Locaynia* and *Ewert* involved minimum work requirements which the veteran, because of his military service, could not satisfy. In *Locaynia*, vacation benefits were reduced for absences exceeding 60 days. This is equivalent to a work requirement of approximately 200 days. 457 F.2d at 1255, n. 5. The agreement in *Ewert* gave full paid vacations only to those who were present for work on all but 90 days of the preceding year, which is a work requirement of approximately 170 days. *Ewert* v. *Wrought Washer Mfg. Co.*, 335 F. Supp. 512, n. 1 (E.D. Wis.)

is both important and recurring, this Court should resolve the serious conflict thta has developed among the circuits.[9]

Furthermore, the problem is proliferating. We are informed by the Department of Labor that there are 24 vacation benefits cases now pending in district courts throughout the country. Many of these cases involve more than one veteran. For example, in *Christiansen* v. *Kaiser Steel Corp.* (C. D. Cal., Civ. Action No. 73-2029-F), 32 veterans have been joined in the action. Included among the defendants are such national concerns as Norfolk & Western Railroad, Burlington Northern Railroad, Penn Central Transportation Company, and Atlantic Richfield. There are also 79 vacation benefits cases which have been re-

[9] The issue is currently pending in the Second and Sixth Circuits, *Lipani* v. *Bohack Corp.*, C.A. 2, No. 74-1471; *Howard* v. *Babcock & Wilcox*, notice of appeal filed March 6, 1974 (C.A. 6).

The district courts are also in disagreement. Three have held that veterans are entitled to vacation benefits as perquisites of seniority, regardless of compliance with work requirements:

Messina v. *Consolidated Freightways Corp.*, 315 F. Supp. 340 (W.D.N.Y.); *Kelly* v. *Chicago, Rock Island & Pac. R. Co.*, 293 F. Supp. 423 (W.D. Okla.); *Austin* v. *Sears, Roebuck & Co.*, C.D. Calif., No. 73-202-F W, decided May 25, 1973, currently pending on appeal, No. 73-2704 (C.A. 9).

Five have reached the opposite conclusion:

Tuttle v. *U.S. Plywood Corp.*, 293 F. Supp. 401 (D. Ore.); *Fees* v. *Bethlehem Steel Corp.*, 335 F. Supp. 487 (W.D. Pa.); *Young* v. *Southern Pacific Transp. Co.*, (C.D. Cal., No. 73-444-RJK, decided September 24, 1973; *Lipani* v. *Bohack Corp.*, 368 F. Supp. 282 (E.D. N.Y.), currently pending on appeal No. 74-1471 (C.A. 2); *Howard* v. *Babcock & Wilcox*, N.D. Ohio, No. C72-966, decided February 1, 1974, notice of appeal filed March 6, 1974 (C.A. 6).

ferred for litigation but which have not yet been filed. Included in this group are such potential defendants as United Air Lines, Weyerhauser Paper Co., Boise Cascade, Safeway Stores, Pan American World Airways and General Motors.[10]

Thus, unless this Court resolves the conflict, veterans who work under a single collective bargaining agreement for a nationwide concern with plants or other facilities in several States will or will not receive vacation benefits under the Act, depending upon the circuit in which the plant they return to is located.

2. The Department of Labor is of the view that those cases which conclude that the veteran is entitled to credit for his military service in determining his eligibility for vacation benefits after his return to his civilian employment correctly interpret this Court's decisions in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, and *Eagar* v. *Magma Copper Co.*, 389 U.S. 323.

Section 9(c)(2) of the Military Selective Service Act guarantees that the returning veteran is to be reemployed without loss of seniority, "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering

[10] We are also informed by the Department of Labor that the 287 vacation benefits complaints that were filed with the Department's field offices in the six-month period between July 1, 1973 and December 31, 1973, represent 18 percent of the total veterans' reemployment rights claims filed under the Act, up from an average of 11 percent of such claims over the prior three fiscal years. Moreover, there appears to be an increased reluctance on the part of employers to settle vacation benefits claims because of the conflict in decisions.

the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).[11]

In *Accardi*, the Court established the principle that "[t]he term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country." 383 U.S. at 229–230. Although recognizing that the severance payments at issue there were in some degree based on the employees' length of service with the company, the Court refused, for purposes of the Act, to treat them as compensation for actual work performed, because of the "bizarre results" possible under the governing agreement, which could result in employees being compensated equally for working a full year or for working only seven days in a year. 383 U.S.

[11] The Act also provides that the veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence * * *." 50 U.S.C. App. 459(c)(1). The dissenting opinion in *Eagar* regarded this provision as controlling entitlement to vacation benefits. 389 U.S. at 325. But *Accardi* indicates that the "other benefits" provision was designed to provide for continuation of company benefits such as insurance during the period of military service. 383 U.S. at 231–232. Since petitioner seeks only to be paid for vacations occurring after his return to his civilian employment, the "other benefits" provision is not applicable.

at 230.[12] Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York, Inc.*, 490 F.2d 586, 590–591, n. 4 (C.A. 2), petition for a writ of certiorari pending, No. 73–1369.

Thus, the Court emphasized, it is necessary to consider whether the benefits are in fact conditioned on continuous employment by the company for the period indicated. If so, regardless of the labels attached to the conditions in the collective bargaining agreement, the benefits are protected by the Act. "The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it." 383 U.S. at 230.

Although *Accardi* dealt with severance pay, this Court has indicated that the same analysis also applies to vacation pay by citing *Accardi* in summarily reversing a holding that vacation benefits were not a perquisite of seniority. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323.[13]

[12] Payments were based on years of "compensated service" with the company. A month of "compensated service" was one in which the employee worked at least one day, and a year of compensated service was "12 such months or a major portion thereof." 383 U.S. at 228.

[13] *Eagar* involved claims for both vacation and holiday pay. The veteran had met all the requirements for holiday pay, except that he had not, because of his military service, been on the company payroll for the three months preceding the holidays involved. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, 324 (Douglas, J., dissenting). There was thus in *Eagar*, as here, a failure because of military service to meet the work requirements for eligibility for benefits; but the Court nonetheless held the veteran entitled to the benefits.

When the *Accardi* analysis is applied to the instant case, the requirement in the collective bargaining agreement that vacation benefits depend on earnings in at least 25 work weeks in the previous year should be regarded as merely a means by which to make eligible for vacation pay all employees who were regularly employed during that year. Like the "compensated service" requirement in *Accardi,* it is not designed to provide deferred compensation for work performed during the qualifying year.[14] Thus, *Accardi* teaches, entitlement to vacation pay is a perquisite of seniority in the sense used in the Act, regardless of whether it is one of the traditional attributes of seniority identified by the court below (App. A, *infra,* p. 15A).

3. Even if the Court disagrees with our contention that, under *Accardi* and *Eagar,* petitioner is, in this case, entitled to credit for his military service in deter-

[14] Indeed, the possible results of considering the payments to be extra compensation are equally bizarre in both cases. Since the agreement here requires only "earnings" in each of 25 work weeks, an employee who works 25 hours—one hour in each of 25 different weeks—is entitled to the same vacation benefit as one who works the normal 2,000 hours per year. There is thus no more necessary correlation between the amount of work the employee performs and his entitlement to benefits than there was in *Accardi,* where the Court noted that either 7 days' or one year's work could result in the same entitlement. 383 U.S. at 230. On the other hand, it should, in candor, be pointed out that under our contention in point 2 of this petition there would be dramatic differences between veterans who entered military service in late December and those who entered in early January after working at their civilian jobs for at least one day in the new year, and similarly between veterans returning to their civilian jobs in late December and those returning in early January. No such disparities would exist, however, under our alternative contention in point 3 of this petition.

mining his eligibility for paid vacations after his return to his civilian employment, we submit that his right under the Act to pro rata vacation benefits based on his 9 weeks of work for the company in 1967 and 13 weeks in 1968 does not depend on whether pro rata benefits are available under the collective bargaining agreement.

The basic principle underlying Section 9 of the Military Selective Service Act is that "he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job.'" *Tilton* v. *Missouri Pacific R. Co.,* 376 U.S. 169, 170–171. This principle may not be undercut by contractual provisions in the collective bargaining agreement. *Fishgold* v. *Sullivan Drydock & Repair Corporation,* 328 U.S. 275, 285; *Accardi* v. *Pennsylvania R., supra,* 383 U.S. at 229.[15] Thus, regardless of the provisions in the collective bargaining agreement, petitioner has a statutory right to at least a pro rata amount of vacation benefits based on his actual civilian service.

Since the 9 weeks he worked in 1967 would have entitled him to 9/25 of the normal vacation benefit had he remained on the job that year instead of entering

[15] Cf. *Palmarozzo* v. *Coca-Cola Bottling Co. of New York, Inc.,* 490 F. 2d 586, 592 (C.A. 2), petition for a writ of certiorari pending, No. 73-1369:

"The Act was premised on the recognition that the man in the military is not represented at the bargaining table and that any special status accorded veterans is an inconvenience to union and management alike. Veterans' Reemployment Rights Under Selective Service Interpretations, 54 Yale L.J. 417 (1945). * * *"

military service, and since the 13 weeks he worked upon his return in 1968 similarly would have entitled him to 13/25 of the vacation benefit had he been on the job rather than in military service during the earlier part of that year, the Act, at a minimum, entitled him to a 9/25 vacation benefit in 1968 and a 13/25 vacation benefit in 1969.[16] Anything less would deprive petitioner of benefits to which he would have been entitled had he not entered military service, and this the Act forbids. Although the collective bargaining agreement may validly deny vacation benefits to employees on leaves of absence for other reasons by limiting the payment of pro-rata vacation benefits to certain situations,[17] the Act, in our view, prohibits the application of such a limitation to leaves for military service . . . and the judgment of the court below should, at a minimum, be modified accordingly.

---

[16] Prorating the vacation pay in this way would avoid the possibility, which troubled the court below, that the veteran would receive a windfall if his military service, for which he received military leave, were also used to compute his elegibility for vacation pay (App. A. *infra*, pp. 16A–17A). See n. 14, *supra*. But see *Travis* v. *Schwartz Mfg. Co.*, 216 F. 2d 448, 454 (C.A. 7) ("compensation paid a veteran during his period of [military] service does not affect his rights under the Act").

[17] For example, the agreement here specifically provides that only employees who are laid off are entitled to prorata vacation benefits (J.A. 54b).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys.

WILLIAM J. KILBERG,
Solicitor of Labor,

HAROLD C. NYSTROM,
Associate Solicitor,

BOBBYE D. SPEARS,
SOPHIA P. PETTERS,
WILLIAM H. BERGER,
Attorneys.
Department of Labor.

MAY 1974.

547-929—74——3

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 73-1083

EARL R. FOSTER, APPELLANT

v.

DRAVO CORPORATION, APPELLEE

On Appeal from the United States District Court for the Western District of Pennsylvania, D.C. Civil Action No. 71-781

Argued October 11, 1973

Before: HASTIE, VAN DUSEN and ADAMS, *Circuit Judges.*

Harlington Wood, Jr., Asst. Attorney General; *Richard L. Thornburgh*, U.S. Attorney; *Robert E. Kopp* and *Jean A. Staudt*, Attorneys, Department of Justice, Washington, D.C., Attorneys for Appellant.

Charles R. Volk, Robert H. Shoop, Jr., Thorp, Reed & Armstrong, Pittsburgh, Penna., Attorneys for Appellee.

Opinion of the Court filed December 26, 1973 by *Circuit Judge* ADAMS.

The issue in this case is whether under the Selective Service Act of 1967 an employee is entitled to full vacation benefits for the years he entered and returned from military service, under the terms of a collective bargaining agreement that conditioned the award of such benefits on the receipt of earnings during 25 weeks of the previous year.

Earl R. Foster, an employee of the Dravo Corporation since August 5, 1965, received a military leave of absence beginning on March 6, 1967. Shortly after completing his military obligation, he returned to the employ of Dravo on October 7, 1968. Foster thus worked for Dravo a total of nine weeks in 1967 and thirteen weeks in 1968.

The collective bargaining agreement between Dravo and Foster's bargaining representative, Industrial Union of Marine and Ship Building Workers of America, Local 61, requires that an employee, in order to qualify for full vacation benefits, "must have received earnings in at least twenty-five (25) work weeks in the twelve (12) months preceding the current December 31st."[1]

It is only on the basis of Foster's failure to meet the twenty-five weeks of work requirement that Dravo challenges his eligibility for vacation benefits.

The language and the overall scheme and purpose of the reemployment provisions of the Selective Service Act of 1967, 50 U.S.C. App. § 459, are determinative of the present dispute about a reemployed veteran's claim to civilian vacation pay on account of time spent in military service.

Section 459(b) requires that a returning veteran "be restored to the position vacated for military service" or, as an acceptable alternative, "to a position of like seniority, status and pay." Because the parties have stipulated that appellee was restored "to the position [he had] vacated," the mandate of § 459(b) has been satisfied and there is no need in this case to consider the allowable alternative of restoration "to a position of like seniority status, and pay."

[1] Article XIV, section 2 of the collective bargaining agreement recites the conditions an employee must fulfill in order to receive vacation benefits. The relevant part of this section reads as follows:

> In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31st and has seniority on the current December 31st must have received earnings in at least twenty-five (25) work weeks in the twelve (12) months immediately preceding the current December 31st.

Rather, the controversy here arises out of the interpretation and application of § 459(c), which reads as follows:

> (c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored *without loss of seniority*, shall be entitled to participate in insurance or *other benefits* offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. (Emphasis added).

Subsections (c) (1) and (2) require that job seniority shall not be adversely affected by military leave, and that, for the purpose of various "other benefits"

enjoyed by employees under the employer's rules and practices, the reemployed veteran shall be treated as "having been on furlough or leave of absence" during his military service.

I

Much in this case turns on whether a particular incident of the employment relationship is regarded as falling under the "seniority" or the "other benefits" language of subsection (c)(1).

There is general agreement as to the differing import of the "seniority" and "other benefits" language of subsection (c)(1). If it is length of service that determines the amount or kind of emolument a returning veteran is to receive, it must be considered a perquisite of "seniority" and the veteran's time spent in the military is included when computing his length of service.[2] If, on the other hand, the particular incident of employment does not accrue simply because of length of service, it must be considered a "benefit" other than one based on seniority, and the returning veteran is entitled to the advantages only if he has met the other conditions.[3]

It is in determining whether a benefit is conditioned simply on length of service or something more that

[2] *See, e.g.* Accardi v. Pennsylvania R.R., 383 U.S. 225 (1966); Tilton v. Missouri Pac. R.R., 376 U.S. 169 (1964). In Fishgold v. Sullivan Drydock & Repair Corporation, 328 U.S. 275, the court enunciated the "escalator principle" which assures that the veteran does not suffer because of his military service in terms of his length of service vis-a-vis fellow employees who do not serve in the armed forces. "[The veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the point he would have occupied had he kept his position." *Id.* at 284–85.

[3] *See, e.g.*, Kasmeier v. Chicago, R.I. & Pac. R.R., 437 F. 2d 151 (10th Cir. 1971); Dougherty v. General Motors Corp., 176 F. 2d 561 (3d Cir. 1949).

difficulty is encountered. In deciding whether the "seniority" or "other benefits" language of subsection (c)(1) governs, we are guided by the Supreme Court's instructions in Accardi v. Pennsylvania Railroad Co.[4] to refrain from unreflective acceptance of the "labels" used by the employer and the union in describing the types of benefits contained in the collective bargaining agreement.[5]

II

Accardi has spawned a group of lower court opinions that, Foster contends, counsel reliance on strictly literal interpretations of the words of the collective bargaining agreement in determining whether a particular benefit, such as vacations, is to be considered a perquisite of "seniority" or to be placed in the category of "other benefits." In *Accardi* itself, which dealt with the issue whether time spent in the military should be included in computing an employee's severance pay, the Supreme Court did point out that under the contract there "bizarre results" were possible: "an employee [could] . . . receive credit for a whole year of 'compensated service' by working a mere seven days."[6]

The Court in making this illustrative statement, however, was not suggesting that so long as any conceivable, although possibly unrealistic, reading of an agreement requires only a minimal work requirement in order to be entitled to a particular benefit, such benefit must be regarded as a prerogative of seniority.[7] The language following the reference to the

[4] 383 U.S. 225 (1966).

[5] *See id.* at 229–30.

[6] 383 U.S. at 230.

[7] *See* Haggard, Veterans' Reemployment Rights and the "Escalator Principle," 51 B.U.L. Rev. 539, 571 (1971) (hereinafter cited as Haggard); Note, The Supreme Court, 1965 Term, 80 Harv. L. Rev. 91, 149 (1966).

"bizarre result," indicates that the Court, instead, reached its conclusion much in the same way an arbitrator does, by considering not only the words of the agreement but also the meaning with which those words are imbued by the general and specific industrial relations milieu:

> The use of the label "compensated service" cannot obscure the fact that the *real nature* of those payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much more work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with seniority should receive the highest allowance since they were giving up more rights and benefits than those with less seniority.[8] (Emphasis added)

Undoubtedly the fact that the contract in *Accardi* had an express provision defining "compensated service" contributed, in some manner, to the result the Court reached. But it certainly would be ironic for the Supreme Court to direct lower courts to abandon the use of labels when deciding whether a benefit is a prerogative of seniority and at the same time direct that they replace such use with a strained and niggardly analysis of the terms of collective bargaining agreements.

Foster suggests, however, that this Court in Hoffman v. Bethlehem Steel Corporation,[9] has interpreted the instructions in *Accardi* to require courts to base their decisions in § 459 cases on improbable construc-

[8] 345 U.S. at 230.

[9] No. 72-1149 (3d Cir. April 3, 1973).

tions of labor contracts.[10] The agreement in *Hoffman* granted to an employee one-half of a supplemental unemployment benefit (SUB) credit unit for each week in which he had "hours of work for the company." Thus, like the agreement in *Accardi*, the *Hoffman* contract contained an express provision that permitted a "bizarre result:" that is, an employee who worked one hour each week could accrue as much SUB credit as one who worked forty hours a week.

It is not clear that *Hoffman* relied solely on the slight possibility that the union and the employer contemplated such a "bizarre result" in concluding that this particular benefit was a prerogative of seniority. Under the agreement in *Hoffman* an employee would receive SUB credits if he were on vacation, on jury duty, performing responsibilities as a union officer, or receiving disability payments for a work-related injury.[11] An employee on a voluntary leave of absence could neither accumulate nor use such credits.[12] Thus, the Court was confronted with a contract granting employees on leaves of absence for certain enumerated reasons the right to accumulate SUB credits, while denying such right to employees on leaves for other reasons.[13] It could not be said,

[10] Brief for Appellant at 13–15.

[11] The agreement expressly precluded the accumulation of SUB credits by an employee while serving in the armed services "except as may otherwise be required by law." The Court apparently reasoned that this quoted language expressly contemplated that the contract would not affect the operation of § 459.

[12] It would be illogical, of course, for a laid-off employee to accrue SUB credits. Such an employee uses these credits at a rate of one per week of layoff. If he could at the same time accumulate credits, one purpose of the credit formula—to limit the company's liability for SUB's—would be, in part, defeated.

[13] See Haggard at 542 for a discussion of the resolution of some apparent inconsistencies created by the language of the statute regarding leaves of absence and furloughs.

therefore, that the accumulation of SUB credits was conditioned exclusively on the actual performance of work.

It would seem that the Court in Hoffman concluded that the policies of § 459, as expressed in *Accardi,* required it, in the specific factual setting there, to resolve in favor of the returning veteran the ambiguity in the contract as to whether the accumulation of SUB credits was a prerogative of seniority.

A close analysis of the SUB plan suggests a second possible distinction between *Hoffman* and the case *sub judice.* Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, subsection 459(c), interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

III

Foster asserts that even if the reasoning in *Accardi* and *Hoffman* do not mandate reversal here, the Su-

preme Court in Eagar v. Magna Copper Company [13] has determined that vacation benefits are to be regarded as prerogatives of seniority. In *Eagar* the collective bargaining agreement required an employee to work 75 per cent of his available shifts within the year and to be in the service of the company at the end of his "vacation earning year" in order to receive vacation benefits for that year.[14] Because the plaintiff had met the first prerequisite—he had worked 75 per cent of the available shifts—Eagar is not persuasive authority for the proposition that vacation benefits are under all circumstances prerogatives of seniority. *Eagar* does establish that should military service prevent an employee from working on a particular day, the last day of his "vacation earning year," he does not forfeit benefits that he has already earned and would receive but for that specific absence.[15] To this limited extent, vacation benefits are considered dependent on length of service, or, in alternative terminology, the veteran is regarded as being "continuously [employed] from the time of his entering the Armed Forces until the time of his restoration to such employment." [16]

[13] 389 U.S. 323 (1967) (per curiam), *rehearing denied* 389 U.S. 1060 (1968).

[14] Magna Copper Co. v. Eagar, 380 F. 2d 318, 319–20 (9th Cir. 1967).

[15] *See* Hollman v. Pratt & Whitney Aircraft, 435 F. 2d 983, 988 (5th Cir. 1970).

[16] 50 U.S.C. App. § 439(c)(2). In Morton v. Gulf, M. & O. R.R., 405 F. 2d 415 (8th Cir. 1969), the contract provided that the number of days of vacation to which an employee was entitled depended on the number of years of compensated service he had with the company. The court concluded that under this contract the amount of vacation did depend on length of service. There is no dispute as to the amount of vaca-

The Circuits, however, differ as to whether Eagar commands automatic classification of vacation benefits as seniority rights regardless of the fact that a particular collective bargaining agreement purports to condition the receipt of vacation benefits on the completion of a specified amount of work.

In Kasmeier v. Chicago, Rock Island and Pacific Railroad Company,[17] the Tenth Circuit declined to extend 1968 vacation benefits to an employee who worked 53 days during 1967 before entering the armed services, where the labor contract required "compensated service on not less than one hundred ten (110) days during the preceding calendar year." The court reasoned that *Eagar* did not control since the plaintiff there had met the work requirement.[18] This Court, in Dougherty v. General Motors Corporation,[19] a pre-*Eagar* case, refused to compel the payment of vacation benefits to a returning veteran in 1946, when the collective bargaining agreement required earnings in 1945, a year during which the veteran was a member of the armed services, to qualify for a vacation in 1946.[20]

---

tion benefits for which Foster is presently eligible. Instead, Foster seeks vacation benefits for years credited to him for the purpose of computing his present benefits but for which he received no benefits.

[17] 437 F.2d 151 (10th Cir. 1971).

[18] *Id.* at 154–55.

[19] 176 F.2d 561 (3rd Cir. 1949).

[20] *See also* Dugger v. Missouri Pac. R.R., 403 F.2d 719 (5th Cir. 1968) (per curiam), *cert. denied*, 395 U.S. 907 (1969), *aff'g* 276 F. Supp. 496 (S.D. Tex. 1967) (failure to meet requirement that employee render compensated service on at least 110 days in preceding calendar year precludes the awarding of vacation benefits to employee who worked for only 85 days because of military service.

Dravo's counsel urged at oral argument that the reasoning and holding of *Dougherty* control here. We cannot, however,

The Ninth Circuit, on the other hand, in Locaynia v. American Air Lines,[21] seems to have held that vacation benefits are *ipso facto* prerogatives of seniority.[22] It appears, however, that the collective bargaining agreement in *Locaynia* did not provide that a specified minimum amount of work was prerequisite to the employee's vacation benefits.[23] In Ewert v. Wrought Washer Manufacturing Company,[24] the Seventh Circuit cites *Locaynia* and uses broad language[25] in sustaining the veteran's claim to vacation benefits. Again, however, the contract in *Ewert* did not contain the type of work requirement present and not met in *Kasmeier* and *Dougherty*.[26] Although it is possible to distinguish these cases from *Kasmeier*, for example, on the basis of differences in the terms of the labor

---

affirm the district court on the basis of *Dougherty* without giving careful attention to the impact, if any, of the intervening Supreme Court decisions in *Accardi* and *Eagar* on the precedential value of *Dougherty*.

[21] 457 F. 2d 1253 (9th Cir.), *cert. denied*, 409 U.S. 982 (1972).

[22] *See* Comments, Reemployment Rights: The Veteran and the Vacation Benefit, 52 B.U.L. Rev. 480 (1973).

[23] 457 F. 2d at 1254 n. 2.

[24] 477 F. 2d 128 (7th Cir. 1973).

[25] The court in *Ewert* stated:

> . . . Whatever one may conclude about the correctness of *Dugger* and *Kasmeier* with respect to the contracts there considered, we have no difficulty in concluding, under *Eagar's* application of *Accardi*, that the vacation rights under the contract in this case are prerequisites of seniority. Accordingly, it is unnecessary to decide that there are no conceivable contractual provisions under which vacation rights are so purely additional compensation for services actually rendered, and so independent of seniority that *Eagar* would not apply. *Id.* at 129.

[26] Ewert v. Wrought Washer Mfg. Co., 335 F. Supp. 512, 512 n. 1 (E.D. Wisc. 1971).

contracts, it is perhaps more candid to concede that a conflict in the Circuits does exist, since it appears that *Locaynia* and *Ewert* did not give more than cursory examination to the provisions of the collective bargaining agreement.

IV

We are thus faced with a difficult choice: (1) to eschew careful analysis of the collective bargaining agreements, implicitly admitting perhaps that courts are inherently incapable of engaging in the somewhat amorphous inquiry necessary to arrive at a just and reasonable construction of the terms of such contracts;[27] (2) or, to venture into that unclearly marked terrain of labor contract interpretation to determine whether the vacation benefits provided by particular agreements are rewards for length of service or additional compensation for work performed. If the former course is followed, then vacation benefits, at least with respect to the returning veteran, would always be considered prerogatives of seniority.

We conclude, instead, that it is our responsibility to give close attention to the contract and other related factors in reaching a determination whether the employer and the employees, through their respresentatives, viewed the particular benefit as additional compensation for work performed or a prerogative of seniority. In situations where a court does not have the fortuitous alternative of referring a dispute to someone, such as an arbitrator, more experienced in

[27] In *Ewert*, the court, although itself disdaining significant examination of the collective bargaining agreement, expressly rejected the apparent statement of the lower court that "vacation rights are always prerequisites of seniority and that there could be no contractual provisions under which vacation rights would fall into the class of other benefits." 477 F. 2d at 128–29.

dealing with the ambiguities and inconsistencies in labor contracts, we find no authority for the proposition that the court is to abdicate its responsibility to fashion a solution after searching inquiry and careful deliberation.[28] Although Congress by way of § 459, has thrust upon the courts controversies necessitating resort to labor contracts for their resolution, it has not directed them to abandon their normal procedures.

[28] We are aware that the task of interpreting labor agreements is an intricate and somewhat specialized one. When the contract provides for arbitration, the Supreme Court has instructed courts to refer disputes concerning the meaning and scope of substantive provisions to the arbitrator unless there is an "express provision excluding a particular grievance from arbitration" or "forceful evidence of a purpose to exclude the claim from arbitration." United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584–85 (1960). In reaching its decision in *Warrior & Gulf*, the Supreme Court noted that the collective bargaining agreement was, in a sense, *sui generis:*

> . . . It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It calls into being a new common law—the common law of a particular industry or of a particular plant. *Id.* at 578–79.

The court added that the arbitrator might well introduce relevant considerations customarily ignored by courts when construing the provisions of a typical commercial contract. *Id.* at 581–82. See Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1487, 1500 (1959). However, in some situations, including the § 9 case before us, courts cannot escape from interpreting collective agreements. *See* Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). *See generally* Note, Labor Injunctions, *Boys Markets*, and the Presumption of Arbitrability, 85 Harv. L. Rev. 636, 644–49. *Warrior & Gulf*, although raising questions as to judicial competence in this area, does not suggest that courts should woodenly construe labor contracts when the alternative of arbitral decision is unavailable.

In *Accardi*, the Supreme Court seems to have rejected any suggestion that it was to adopt a novel approach in § 459 cases.[29] In an earlier case, Aeronautical Lodge 727 v. Campbell,[30] the Court's language suggests the conclusion we reach here:

> It is . . . apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of seniority which the Selective Service Act guaranteed the veteran. Barring legislation not here involved, seniority rights derive their scope and significance from union contracts. . . .[31]

V

Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work week for any period of time without being discharged. Even assuming, for example, that a particular employee's job calls for ten hours of work per week, it is questionable that an arbitrator, or a court in the absence of an arbitration provision, would award such employee full vacation benefits under this contract. It appears quite likely that if this problem were raised during negotiations, the parties' understanding would comport with such a determination.

A more detailed examination of Foster's claim to vacation benefits and of the terms of the collective bargaining agreement, informed by an appreciation of

[29] *See* pp. 5–6, *supra;* Haggard at 571.

[30] 337 U.S. 521 (1949).

[31] *Id.* at 526.

the background understandings shared by the parties to labor contracts, supports the conclusion that the vacation benefits are not prerogatives of seniority.

It has been stipulated that from August 5, 1965 until his 1967 induction into the armed forces, Foster was employed by Dravo "as a sealer at an hourly rate of $2.62." Upon his release from military service he was "restored in his pre-service position . . . on or about October 7, 1968, at an hourly rate of $2.92." It also is stipulated that before and after military service Foster was recognized as enjoying "plant seniority" as of August 4, 1965, the date of his original hiring.

"Seniority," as used in this stipulation and generally in labor relations, is a priority factor that normally serves to protect workers' long term interest in job security by determining preference in such matters as advancement, layoffs and rehiring. Indeed, Article XIV of the labor contract that regulated Foster's employment defined "Seniority" as "the right of preference in layoffs or rehiring, measured by length of service in a job classification. . . ." Foster's interests of the type that are normally determined by seniority have been duly protected by measuring his seniority from the date of his original employment without interruption by reason of his military leave.

Vacation with pay, on the other hand, is normally and reasonably considered part of a worker's current or short term return for labor. Under this view, actual work time during a year provides a fair measure of the amount of annual vacation currently earned.[32] Ac-

[32] Seniority also may be consequence to the extent that a worker is allowed a shorter maximum vacation for his first or other early year of employment than for a subsequent year. It is not disputed here that the appellant is entitled to full seniority from the date of his original employment in determining how long a vacation he could earn during a particular calendar year.

cordingly, the labor contract in this case measures the amount of paid vacation that a worker has earned on a basis different from seniority.

The contract specifies that to qualify for the maximum allowable annual vacation a worker must have "received earnings" in 25 work weeks during the immediately preceding calendar year. Thus, it is reasonable to treat the vacation pay that the employer provides as deferred compensation for work recently performed. But during about nine months of each of the years in question here [33] Foster was a soldier and the army was responsible for his pay, on leave as well as during duty. To allow him at the same time to accrue civilian vacation credit in anticipation of his return to civilian employment would be inconsistent with, or at least an anomalous exception to, the general concept of earned vacation. Accordingly, section 459 (c) is fairly and reasonably construed as not obligating the civilian employer to confer that benefit upon the returning soldier unless it is the employer's practice to accrue vacation pay credits for employees during similar periods of uncompensated leave granted for reasons other than military service. It is neither alleged nor indicated by the record that the present employer has engaged in any such practice.

This case does not present a dilemma like the one this Court faced in *Hoffman*—some employees on leaves of absence received SUB credits under the agreement while others did not. Hence, we need not rely on the general Congressional policies undergirding § 459 in order to resolve an ambiguity created by inconsistent treatment of situations similar to the veteran's in the collective bargaining agreement. Further, as we have already indicated, the essential char-

[33] The claim here covers vacation pay for the full calendar years during which the appellant entered and left military service.

acter of the respective benefits at issue in *Hoffman* and this case are significantly different.

Moreover, there are not present here circumstances where the veteran has barely failed to qualify for full benefits under the language of the contract.[34] Close adherence to the contractual language will not therefore be manifestly unjust and there is little danger that such adherence will promote disharmony between the employer and the employee.

In sum, we hold that the terms of this collective bargaining agreement require twenty-five full work weeks,[35] and Foster's failure substantially to comply in this case precludes his claim to full vacation benefits. This result is consistent with the general purpose of § 459 to assure that the veteran when he returns to his pre-induction employment relationship is not disadvantaged vis-a-vis fellow employees who did not enter the military service. To hold that in this case Foster is entitled to vacation benefits, we would, in effect, be granting to the returning veteran a windfall at the expense of his employer and be discriminating against employees who are required to meet the conditions of the collective bargaining agreement if they are to receive vacation benefits. This outcome would be contrary to the intent and logic of § 459.

VI

Our determination that Foster is not entitled to full vacation benefits under the collective bargaining agreement does not prevent his asserting a claim for pro rata vacation benefits under the provision of the con-

[34] *Cf.* Dugger v. Missouri Pac. R.R., 403 F.2d 719 (5th Cir. 1968) (per curiam), *cert. denied*, 395 U.S. 907 (1969), *aff'g* 276 F. Supp. 496 (S.D. Tex. 1967).

[35] *See* Fees v. Bethlehem Steel Corp., 335 F. Supp. 487 (D.C.W.D. Pa. 1971); Bradley v. General Motors Corp., 283 F. Supp. 481 (E.D. Mo. 1968).

tract providing for such benefits.[36] The district court did not decide whether Foster is entitled to such benefits.

Although the complaint contains a general claim for vacation benefits, there is no specific averment relating to the pro rata benefits. The distinguished district court judge, however, after Foster's counsel adverted to the provision relating to pro rata benefits, urged the parties to reach a compromise apparently along lines suggested by the language of that provision.[37] In light of these conflicting circumstances, revealed in the record, we believe an appropriate course is to remand for a determination whether the question of Foster's rights to pro rata benefits was properly raised in the district court and, if so, for a decision on the merits of his claim to pro rata benefits.

Accordingly, the judgment will be vacated and the case remanded for action in conformity with this opinion.

HASTIE, *Circuit Judge*, concurring.

I agree and add only that, in my view, the considerations that are decisive in this case and should be most helpful to district judges in distinguishing advantages of seniority from "other benefits" under Section 459(e), are those set out in Part V of Judge Adams' opinion.

---

[36] Article XIV, section 2 of the collective bargaining agreement provides, in part, as follows:

> However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked (25) weeks or more.

[37] Transcript at 65–79a.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 73-1083

EARL R. FOSTER, APPELLANT

v.

DRAVO CORPORATION

(D.C. Civil No. 71-781)

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: HASTIE, VAN DUSEN and ADAMS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 3, 1972, be, and the same is hereby vacated and the cause remanded for action in conformity with the opinion of this Court.

ATTEST:

T. F. QUINN,
Clerk.

Dated: December 26, 1973.

Certified as a true copy and issued in lieu of a formal mandate on January 24, 1974.

Test: Thomas F. Quinn, Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX C

In the United States District Court for the Western District of Pennsylvania

CIVIL ACTION NO. 71–781

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

OPINION AND ORDER

This is a civil non-jury proceeding by which plaintiff seeks to compel defendant to pay him vacation benefits pursuant to § 9(d) of the Selective Service Act of 1967, 50 U.S.C.A. § 459(d).

Based on the stipulation of counsel, plaintiff, Earl Foster, began full time employment with defendant on August 5, 1965, and has seniority with the company from this date. On March 6, 1967, this employee was given a leave of absence to be inducted into the military. After an honorable discharge, plaintiff made timely application for and was reinstated to his former job on October 7, 1968. Foster worked nine weeks and thirteen weeks respectively in 1967 and 1968, the years for which vacation pay is sought, although had he not been in the military he would have worked without any layoff. The question presented is whether plaintiff is entitled to vacation benefits for the years in question in spite of the requirement contained in the pertinent collective bargaining agreement that an employee, to be eligible for vacation benefits, must have had earnings in twenty-five weeks in the twelve months immediately

preceding the current December 31st. In view of plaintiff's failure to satisfy said requirement, it is the considered judgment of this Court that he is not entitled to any vacation benefits for the years in question.

The Court has had occasion to consider this question previously in *Fees* v. *Bethlehem Steel Corporation,* 335 F. Supp. 487 (W. D., Pa. 1971). Therein it was held that an individual must satisfy contractual work requirements to obtain vacation benefits, provided such requirements do not penalize a veteran for his military service. See also *Dougherty* v. *General Motors,* 176 F. 2d 561 (3d Cir., 1949), cert. denied 338 U.S. 956 (1950). As in *Fees, supra,* there is nothing in the present contract which would detract from the automatically accruing rights of returning servicemen. Accordingly, there is no basis for concluding that plaintiff has been denied any rights to be accorded honorably discharged military personnel under the Selective Service Act of 1967.

Findings of fact and conclusions of law have not been separately stated but are included in the body of the foregoing opinion as specifically authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

An appropriate order is entered.

ORDER

AND NOW, this 3rd day of November 1972, it is ordered that judgment be and hereby is entered in favor of defendant, Dravo Corporation, and against plaintiff, Earl R. Foster.

WALLACE S. COURLEY,
Senior District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
NOV 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER,

Petitioner

—v.—

DRAVO CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 25, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER,

Petitioner

—v.—

DRAVO CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX TO APPENDIX

	Page
Docket Entries	1
Complaint	3
Answer	6
Stipulation of Fact	8
Interrogatories answered by Dravo Corporation	12
Collective Bargaining Agreement	28
District Court proceedings	59
District Court opinion and order	[Appendix C to Petition for a Writ of Certiorari]
Court of Appeals opinion	[Appendix A to Petition for a Writ of Certiorari]
Court of Appeals judgment	[Appendix B to Petition for a Writ of Certiorari]
Notice of Appeal	109
Order allowing certiorari	110

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1971	
Aug. 20	Complaint filed
Aug. 23	Summons issued
Aug. 31	Summons returned served on deft. 8/15/71
Sept. 13	Stipulation for extension of time to answer and proposed order filed.
Sept. 20	Order entered extending time for deft. to answer or otherwise plead until 9-30-71. (Miller, J.)
Sept. 24	ANSWER filed by deft.
1972	
Apr. 21	Interrogatories by plf with answers of deft Dravo Corp. thereon (1-18)
Apr. 28	Order entered transferring case to Wallace S. Gourley (Miller, J.)
May 4	Order entered Setting Procedure until disposition of Case. (Gourley, J.)
May 4	Order entered fixing non jury trial for 5-30-72 at 10 A.M.; counsel for plft. to file pretrial within 10 days of receipt of this order; counsel for deft. within 15 days and pretrial stip. within 20 days. (Gourley, J.)
May 18	Pltf's Pretrial Stmt filed.
May 19	Deft's Pretrial Stmt filed.
May 23	Order entered directing that the Non Jury Trial previously fixed for 5-30-72 at 10 am is continued until 5-31-72 at 10am. (Gourley, J.)
May 31	Non Jury Trial held before Gourley, J. & Concluded. (Order to be entered) (Ct Rep M. Brown) (Hearing Memo Filed.)

DATE		PROCEEDINGS
1972		
May	31	Stipulation of Fact filed by counsel.
June	2	Deft's pretrial memorandum filed
June	2	Order ent directing briefs befiled. Counsel to submit to Court before 7/24 suggested findings of fact and conclusions of law. Reporter to transcribe non jury trial held 5/31 at joint expense of parties (Gourley, J.)
July	5	Transcript filed re Non Jury trial held 5-31-72 before Gourley, J. (Rep. M. Brown)
July	28	Findings of Fact and Conclusions of Law filed by deft Dravo Corp.
Nov.	6	Opinion filed and Order entered 11-3-72 directing judgment is hereby entered in favor of the Deft. Dravo Corporation and against the Pltf. Earl R. Foster. (Gourley, J.)
Nov.	6	Pursuant to Opinion filed and Order entered on 11-3-72 Judgment is hereby entered as accordingly. BERNARD SCHAFFLER, CLERK
Nov.	6	Notice Mailed.
Nov.	21	Notice of Appeal filed by pltf.
Nov.	21	Copy of Notice of Appeal mailed U. S. Court of Appeals; copy of Notice of Appeal mailed to counsel for deft.; letters to all counsel of Record and Judge Gourley.
Dec.	18	Original Record and Exhibits mailed U. S. Court of Appeals.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

COMPLAINT

Plaintiff, Earl R. Foster, by Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania for his cause of action alleges that

1) The jurisdiction of this court is based on the provisions of section 9(d) of the Universal Military Training Service Act, as amended (act of June 24, 1948, c. 625, section 9; 62 Stat. 614 as amended; 50 U.S.C., App. 459 et seq), hereinafter referred to as the Act.

2) Plaintiff brings this action to require defendant to accord him vacation entitlement rights which he has earned and for damages suffered in loss of pay and other benefits by reasons of defendant's failure and refusal to accord said rights.

3) The plaintiff is an individual residing at 111 Ramsey Avenue, Corapolis, Pennsylvania.

4) Defendant is a corporation doing business and maintaining offices within the jurisdiction of this Court, specifically in Pittsburgh, Pennsylvania.

5) The plaintiff was first employed by defendant on or about August 5, 1965.

6) Plaintiff left his employment with the defendant for the purpose of induction into the Armed Forces of the United States and entered into the Armed Forces of the United States on or about March 6, 1967.

7) Plaintiff's position and employment with the defendant at the time he entered military service was one other than a temporary position.

8) Plaintiff served in said Armed Forces until on or about October 1, 1968, at which time he was honorably released therefrom and received a certificate evidencing satisfactory completion of his military training and service.

9) Plaintiff complied with all statutory requirements and conditions for restoration to employment by defendant, including timely application therefor, and was restored to his pre-service position by the defendant on or about October 7, 1968.

10) Upon his return from military service and his restoration to his pre-service position, defendant penalized plaintiff for his military absence by refusing to recognize and grant his vacation benefits commensurate with his length of service in defendant's employ.

11) Defendant has continuously refused and now refuses to comply with plaintiff's demand for proper credit for vacation benefits, in violation of the provisions of the Act.

12) As a result of defendant's refusal to grant plaintiff his proper vacation credit and compensation based thereon, plaintiff has suffered and continues to suffer substantial loss of pay which damage he would not have suffered if he had been properly and promptly granted the vacation credits to which he was entitled.

WHEREFORE plaintiff respectfully prays:

a) that this Honorable Court adjudge and decree that plaintiff is entitled to vacation credits and benefits commensurate with his seniority.

b) that defendant be ordered to compensate plaintiff for damages suffered by reason of the loss of pay and other benefits which would have accrued had he been granted proper vacation credit promptly.

c) that plaintiff have such other and further relief that this Honorable Court may deem just and proper.

/s/ _____
Richard L. Thornburgh
United States Attorney

/s/ _____
Blair Griffith
Assistant United States Attorney

OF COUNSEL

/s/ _____
Peter G. Nash
Solicitor of Labor

/s/ _____
Louis Weiner
Regional Solicitor

/s/ _____
Sidney Salkin
Attorney

UNITED STATES DEPARTMENT OF LABOR

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

[Received Sep. 27, 1971, 10:15 AM, J. S. Attorney's Office, Pittsburgh, Pa.]

EARL R. FOSTER, PLAINTIFF

vs.

DRAVO CORPORATION, DEFENDANT

ANSWER

AND NOW comes the defendant DRAVO CORPORATION by its counsel, Charles R. Volk and Thorp, Reed & Armstrong, and answers each paragraph of the Complaint in the above captioned matter as follows:

1. The averments of paragraph 1 are admitted.
2. This paragraph contains the motivations of the plaintiff which is within his exclusive knowledge. However, the defendant denies all implications that it has failed to accord the plaintiff any rights due him.
3. The averments of paragraph 3 are admitted.
4. The averments of paragraph 4 are admitted.
5. The averment of paragraph 5 is admitted.
6. The averments of paragraph 6 are admitted.
7. The averment of paragraph 7 is admitted.
8. The averments of paragraph 8 are admitted.
9. The averments of paragraph 9 are admitted.
10. The averments of paragraph 10 are denied.
11. The averments of paragraph 11 are denied.
12. The averments of paragraph 12 are denied.

WHEREFORE, defendant respectfully prays that this Honorable Court dismiss the Complaint and enter judgment for the defendant.

THORP, REED & ARMSTRONG

/s/ Charles R. Volk
Charles R. Volk
Attorneys for defendant
Dravo Corporation

UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

STIPULATION OF FACT

1. Plaintiff was initially employed by the defendant on or about August 5, 1965, and he remained continuously employed until he was granted a military leave of absence by defendant and left his employment on or about March 6, 1967, for induction into the Armed Forces of the United States.

2. At the time plaintiff left his employment as aforesaid, he was employed as a scaler (hand brush) at an hourly rate of $2.62.

3. The aforementioned employment was in an other than temporary position.

4. Plaintiff served in the Armed Forces until October 1, 1968, and thereafter made timely application to defendant for reinstatement in his employment, and was restored in his pre-service position by defendant on or about October 7, 1968, at an hourly rate of $2.92.

5. At all times material hereto, plaintiff's plant seniority was and is August 5, 1965.

6. By the terms of a collective bargaining agreement then in force between plaintiff's collective bargaining representative, Industrial Union of Marine and Ship Building Workers of America, Local Union No. 61, AFL-CIO, and defendant, vacation benefits and eligibility therefor are provided in Article XIV, Sections 1 and 2. A copy of said provisions of the said collective bargaining agreement are attached hereto and marked Exhibit

1. Said collective bargaining agreement and the aforementioned provisions thereof were in effect according to their respective terms at all times relevant to the present case.

7. In addition Article X, Section 8 of the aforesaid agreement provides that "an employee who is granted a leave of absence shall retain and accumulate seniority for the period of the leave of absence".

8. Article XIV defines "Seniority" as "the right of preference in layoffs or rehiring, measured by length of service in a job classification at the Heavy Metals Plant" and Section 2, lines 5-8 of said agreement provides: "continuous employment as used in this Article means continuous seniority since any break in such seniority caused by any of the reasons enumerated in Section 7 of Article X of the agreement."

Article XIV, Section 1 of the agreement provides that on the first December 31 of his employment, an employee receives four hours paid vacation for each month in which he worked ten days or more; the second December 31 of continuous employment he received one (1) week and two (2) days of paid vacation. Progressively longer paid vacations are awarded up to the 30th year, always based on years of continuous employment as of December 31. Article XIV, Section 2 provides that beginning with the second December 31 of employment and thereafter, in order to qualify for vacations, an employee must have "received earnings" in 25 workweeks in the 12 months immediately preceding the current December 31. Article XIV, Section 2 (lines 23 through 29), further provides: ". . . employees who are laid off during the year immediately preceding December 31, and because of such layoff, do not qualify for a vacation under this section will be given a prorata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to 25 weeks . . .".

9. Plaintiff received all vacation benefits due him for the year 1966 before entering military service on or about March 6, 1967. In the period from on or about March 3, 1967, to on or about October, 1968, the plaintiff would not have been laid off.

10. During the period between on or about March 6, 1967, and October 7, 1968, while the plaintiff was absent in the military service, approximately 12 employees who were junior to the plaintiff in terms of plant seniority date and who were not called for induction into the military service, received earnings in at least 25 workweeks in each of the calendar years 1967 and 1968, and were thereby eligible for vacation benefits. Said junior employees, the number of workweeks worked, and the vacation credits received are hereto attached as stipulation Exhibit 2.

11. Plaintiff's vacation benefits would have amounted to 64 hours for the calendar year 1967 and 72 hours for the calendar year 1968, based on his seniority and length of continuous service with the defendant.

12. Article V of the aforesaid Agreement recognizes the Company's right to discharge or discipline employees for "proper cause".

In the event the Court finds for the plaintiff in this case it is stipulated and agreed that the damages incurred and payable to plaintiff by defendant by virtue of defendant's denial of plaintiff's vacation pay and other benefits shall be 377.2.

/s/ _____
Richard L. Thornburgh
United States Attorney

/s/ _____
Blair Griffith
Assistant US Attorney

OF COUNSEL

/s/ _____
Richard F. Schubert
Solicitor of Labor

/s/ _____
Louis Weiner
Regional Solicitor

/s/ _____
Sidney Salkin
Attorney

UNITED STATES DEPARTMENT OF LABOR

THORP, REED & ARMSTRONG

By: /s/ _____
Charles R. Volk, Esquire
2900 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

INTERROGATORIES PROPOUNDED BY PLAINTIFF TO BE ANSWERED BY A RESPONSIBLE OFFICER OF DRAVO CORPORATION, ENGINEERING WORKS DIVISION

Now comes Earl R. Foster, plaintiff in the above styled action by his counsel Richard L. Thornburgh, United States Attorney for the Western District of Pennsylvania and requests that defendant corporation, Dravo Corporation, Engineering Works Division, by an officer competent to answer on its behalf, answer under oath in accordance with the Federal Rules of Civil Procedure, the following interrogatories:

1) State the complete title of plant, unit, and/or division of Dravo Corporation wherein the plaintiff herein, Earl R. Foster, was and is employed.
Engineering Works Division, Paint Department

2) State the name, official title, any job or sub-classification thereof, salary, grade, and hourly rate paid of the position held by the plaintiff, as of August 5, 1965.
Scaler (Hand Brush)
$2.47 per hour

3) State the plaintiff's company, plant, and unit/division seniority dates as of March 3, 1967.
August 5, 1965

4) State plaintiff's job seniority date, official title, and job or sub-classification thereof, salary, grade, and hourly

rate paid of the position held by the plaintiff as of March 3, 1967.
August 5, 1965
Scaler (Hand Brush)
$2.62 per hour as of October 1, 1966—Rate change due to contractual adjustment.

5) State plaintiff's company, plant, and unit/division seniority date as of October 7, 1968.
August 5, 1965

6) State the name, official title, and job or sub-classification thereof, salary, grade, and hourly rate paid of the position held by the plaintiff as of October 7, 1968.
Scaler (Hand Brush)
$2.92 per hour as of October 7, 1968

7) State the job seniority date of the plaintiff as of October 7, 1968.
August 5, 1965

8) Who was the plaintiff's collective bargaining representative during the period from March 3, 1967, to present?
Industrial Union of Marine and Shipbuilding Workers of America, Local No. 61, A.F.L.—C.I.O.

9) List the complete history of the plaintiff's employment by the Dravo Corporation between August 5, 1965, to present, indicating all positions held (and sub-classification within any position), the dates attained, the job classification number, pay grade, and hourly rate attached to the said positions, dates of layoffs and recall, if any.

Hired August 5, 1965, as Scaler (Hand Brush) at a rate of $2.47 per hour.

October 1, 1965, Mr. Foster's hourly rate was advanced to $2.51 per hour as the result of a contractual adjustment.

Mr. Foster requested and was granted a Military Leave of Absence for the period April 3 to April 30, 1966.

May 4, 1966, Mr. Foster returned to active employment at the same rate of pay and classification as when he left on the Military Leave of Absence.

October 1, 1966, Mr. Foster's pay rate advanced to $2.62 per hour as the result of a contractual wage adjustment.

March 6, 1967, Mr. Foster requested and was granted a Military Leave of Absence to commence March 7, 1967.

Mr. Foster returned to active employment on October 7, 1968, as a Scaler (Hand Brush) at a rate of $2.92 per hour.

September 1, 1969, Mr. Foster's pay rate advanced to $3.09 per hour as the result of a contractual wage adjustment.

July 20, 1970, Mr. Foster entered the classification of 2nd class Handyman-Paint at the rate of $3.24 per hour.

September 1, 1970, Mr. Foster's pay rate advanced to $3.40 per hour as the result of a contractual wage adjustment.

November 23, 1970, Mr. Foster advanced to 1st class Handyman-Paint at a rate of $3.47 per hour.

June 9, 1971, Mr. Foster was laid off in his Handyman classification and bumped back to his Scaler classification at the rate of $3.24 per hour.

July 9, 1971, Mr. Foster entered the classification of Rigger, 3rd class, at the rate of $3.63 per hour.

September 1 until October 21, 1971, Mr. Foster was on strike due to the expiration of the labor agreement with Local 61.

November 15, 1971, Mr. Foster's pay rate advanced to $4.03 per hour as the result of a contractual wage adjustment.

November 22, 1971, Mr. Foster was advanced to 2nd class Rigger at a rate of $4.22 per hour.

March 27, 1972, Mr. Foster was advanced to 1st class Rigger at a rate of $4.47 per hour. This remains his status at this time.

10) State the number of workweeks worked by the plaintiff and for which he received earnings from the defendant in the course of his employment by the defendant, for each calendar year from the period August 5, 1965, through December 31, 1968.

1965—22 weeks
1966—47 weeks
1967— 9 weeks
1968—13 weeks

11) Was a seniority roster maintained by the defendant of the unit and/or division of the Dravo Corporation wherein the plaintiff, Earl R. Foster, was and is employed covering the period from on or about August 5, 1965, to December 31, 1968? If so kindly attach a copy of same.

Yes—Attached

12) During the period from on or about March 3, 1967, to on or about October 7, 1968, list the names and addresses of all employees of the defendant employed in the same plant, unit/division, as the plaintiff had been on March 3, 1967, who were junior in seniority to the plaintiff.

Attached

13) As to each of the employees named in the answer to the preceding interrogatory state:

a) their seniority dates
b) the number of workweeks worked in which they received earnings in their employment by defendant in each of calendar years 1967 and 1968
c) the number of vacation credits or benefits with pay they received in each of the calendar years 1967 and 1968

d) state the dates of layoffs and recall, if any, of these employees for each of the calendar years 1967 1968

Attached

14) In the period from on or about March 3, 1967, to on or about October 7, 1968, had the plaintiff not been absent in the military service, would he have worked and received earnings therefor in the employment of the defendant for at least 25 weeks in each of the calendar years 1967 and 1968.

Yes

15) If your answer to the preceding interrogatory is in the affirmative, would the plaintiff have accrued vacation benefits for each of the calendars 1967 and 1968? If so, compute the specific amount of vacation benefits and the nature thereof for each of the calendar years 1967 and 1968.

1967—64 hours

1968—72 hours

16) Was there a collective bargaining agreement in force between plaintiff's union and the defendant covering the period March 3, 1967. to October 7, 1968? If so kindly attach a copy to your answer hereto.

Yes—Attachment (1966-1968 Agreement)

17) In defendant's answer to plaintiff's complaint what are the facts upon which defendant bases its denial of the avernments of paragraph X of the plaintiff's complaint?

Plaintiff worked from January 1, 1967 until March 3, 1967 or a total of nine (9) work weeks in 1967. Plaintiff then entered military service, returning to defendant's employ on October 7, 1968 and continued in such employ through the end of the vacation eligibility period of December 31, 1968, or a total of thirteen (13) work weeks in 1968.

Under Article XIV, Section 2, paragraph one (1) of the collective bargaining agreement then in effect between plaintiff's authorized bargaining representative and defendant (which agreement is attached hereto in answer to Interrogatory sixteen (16), any vacation benefits forthcoming to plaintiff for the year 1969 were contingent upon plaintiff having met three criteria:

1. plaintiff must have been continuously employed for two (2) or more December 31st;
2. he must have had seniority on December 31st of 1969; and
3. he must have received earnings in at least twenty-five (25) work weeks in the twelve (12) months immediately preceding December 31st of 1969.

Thus, plaintiff failed to meet the twenty-five (25) week earnings requirement of the third contingency noted above and was denied vacation benefits for 1969 for this reason. Contrary to the allegation of paragraph ten (10) of plaintiff's complaint; plaintiff's military service was recognized as affording compliance with contingencies one (1) and two (2) set forth above. Had these two criteria, based on length of service, been the only criteria necessary to receive vacation benefits, plaintiff would have qualified. However, plaintiff failed to qualify for vacation benefits for he did not satisfy the criteria of contingency three (3) set forth above. Inasmuch as the earnings requirement of contingency three (3) is not an attribute or prerequisite of seniority or length of service, but rather a qualification based upon time worked and thus earned toward vacation benefits, defendant was not obligated to award plaintiff vacation benefits for the year 1969.

18) In defendant's answer to plaintiff's complaint what are the facts upon which defendant bases its denial of the averments of paragraph XII of the plaintiff's complaint?

Please refer to the answer provided for Interrogatory number seventeen (17).

Richard L. Thornburgh
United States Attorney

Blair Griffith
Assistant US Attorney

OF COUNSEL

/s/ Richard F. Schubert
Richard F. Schubert
Solicitor of Labor

/s/ Louis Weiner
Louis Weiner
Regional Solicitor

/s/ Sidney Salkin
Attorney
UNITED STATES DEPARTMENT OF LABOR

/s/ Charles A. Patten
Charles A. Patten
Vice President and General
Manager-Engineering Works
Division
DRAVO CORPORATION

ANSWER TO INTERROGATORY ELEVEN (11)
FOLLOWS THIS PAGE

SENIORITY REGISTER DRAVO CORPORATION ENGINEERING WORKS DIVISION - NEVILLE ISLAND - AUGUST 1, 1966

Seniority #11

PUNCH OPERATOR - RACK

[illegible], Paulo Antonio	1-16-[illegible]
McClellan, Joseph	6-21-41
[illegible], Rudolph	12-18-41
Labisak, Anthony	11-3-47
McClellan, Charles L.	7-23-59
O'Rourke, William C. Jr.	8-27-60
Yost, Paul	12-21-60
Simonis, Albert B.	5-28-65
Clemente, Orlando	2-9-65
Boyle, Wesley	1-3-66

ROD LEADER

Tolpas, George	8-24-42
Reyes, Joseph	1-25-43
Bridges, Arthur	3-8-43

RIGGER

Fuchs, Albert G.	11-18-42
Mosko, Stephen	5-3-27
Zucak, Frank	7-25-27
Door, Vernon	11-15-30
Burmosky, Andrew	4-29-31
Krull, August	5-16-33
Drenillo, Nanslov	6-18-34
McChesney, William	10-22-34
Milo, George	5-16-36
Yurko, Andrew Jr.	11-1-36
Sopada, Joseph	6-16-41
Watters, Edward	10-25-41
Reckenwald, Walter	7-2-42
McCorkle, William	11-25-42
Obid, Edward	11-30-42
Sheriff, Raymond L.	2-15-43
Kaczmarek, Bernard	6-14-43
[illegible]fferman, Charles A.	11-10-46
Lalley, Richard C.	11-17-47

RIGGER (CONTD)

Rupert, Melvin L.	11-22-49
Kevish, Joseph	1-15-51
Sicher, Guido	1-15-51
Olenik, John	8-13-51
Kortner, Alex	11-12-51
Waltonbaugh, Wesley	12-30-51
Sbano, Albert	9-23-52
Weidner, Harold C.	10-8-53
Wilczak, Steve F.	6-27-55
Spisak, Joseph T.	7-14-55
Guyaux, John C.	3-11-57
Boeh, Egbert C. Jr.	4-15-57
James, Winston C.	5-22-57
Wilson, Johnnie A.	6-10-57
Spichak, John A. Jr.	7-8-57
Benz, Paul P.	7-1-60
Quaglieri, William J.	7-30-60
Pavlik, John P.	8-1-60
Miller, James T.	8-12-60
Williams, Theodore R.	8-22-60
Easton, Noel	9-12-60
Darabant, Andrew	10-24-60
Perri, Ventura	5-17-61
Taylor, Theodore R.	3-7-62
Lottes, Martin G. Jr.	3-21-62
McCaslin, Raymond L.	11-8-62
Laukis, Paul F.	4-8-63
Bomba, Bernard L.	4-24-63
Kraus, Joseph J.	2-5-64
Heffernan, Thomas W.	2-10-64
Stephens, Richard E.	1-11-65
Francis, Robert R.	1-11-65
McQuillan, Kenneth F.	1-11-65
Fathauer, Raymond G.	1-11-65
Heffernan, Thomas W. Jr.	1-11-65

RIGGER (CONTINUED)

Krobot, Roy J.	4-6-65
Sciarretti, James A. Jr.	4-12-65
Millantz, John M.	4-28-65
Fee, Charles, Jr.	5-10-65
Baker, Andrew R.	7-6-65
Kroll, John	9-5-65
Vratoric, John Jr.	9-13-65
Seebocher, Ralph J. Jr.	10-25-65
Grimm, Ronald	11-1-65
Hildebrand, Robert W.	11-1-65
Morrow, Raymond R.	11-8-65
Reichel, Albert G.	12-8-65
Garvoda, Andrew L. Jr.	1-3-66
Grogan, Edward T.	1-6-66
Weltner, Richard N.	1-14-66
Jabaut, Donald R.	1-24-66
Zieger, Robert J.	2-7-66
Motz, Gene W.	4-4-66
Edder, Robert H.	5-31-66
Donicchi, Joseph	5-31-66
Roupe, James G. Jr.	5-31-66
Molnar, Emery J.	7-11-66
Bomba, Gene T.	7-11-66

PAINTER

Darabant, Robert J.	5-6-65
Shuttleworth, Donald F.	1-10-66

SCALER - HAND BRUSH

Callick, George	5-25-25
Martick, John	3-26-29
Macejovsky, Joseph	4-12-29
Mickenin, Andrew	10-9-29
Burmosky, Andrew	5-21-30
Carson, Horace	5-22-38

BEST COPY AVAILABLE

SENIORITY REGISTER DRAVO CORPORATION ENGINEERING WORKS DIVISION - NEVILLE ISLAND - AUGUST 1, 1966

SCALER-HAND BRUSH (CONTD)

	[illegible], Michael	6-18-34
	Fox, Andrew	8-20-34
	[illegible], Andrew Jr.	10-23-35
	Dolkevitz, Frank J.	3-16-36
	Fecora, John Michael	5-26-36
	Medvits, August	6-2-36
	Dallaver, Alberto D.	6-18-36
	Test, Eugene J.	6-25-36
	Dudek, John	12-6-37
S	Dunn, Pietro	9-30-39
S	McCullough, H. D.	11-10-39
	Dalato, Edward David	5-14-40
	Dilma, George J.	7-29-40
	Dunlr, Michael James	9-24-40
	Dilay, Joseph	1-20-42
	Dalvas, George	5-4-42
	Dold, Edward	8-21-42
	Dolardi, Joseph	8-29-42
	Grisham, John	9-15-42
	Vansen, Dallie	9-24-42
	Irvin, Raymond E.	10-26-42
	Kors, Philip	2-8-43
	Dobbins, George A.	2-17-43
	Eldridge, Robert	3-11-43
	McCab, Jim	4-5-43
	Sloan, Eddie C.	5-17-43
	Davis, Jethro P.	5-24-43
	Cook, Matthew N.	4-17-44
	Wilson, Sonny	10-19-44
	Cregg, Robert	4-16-45
	Cutley, Fulton	1-9-46
	Littlejohn, James R.	1-15-46

SCALER-HAND BRUSH (CONTD)

	Sicher, Guido L.	1-15-46
	Holloway, Albert	1-20-47
	Rivers, Leo F.	8-21-47
S	Campalong, Robert C.	9-11-47
	Cymrych, Michael A.	12-27-48
	Taylor, Charles A.	4-17-49
	Skulyo, George	6-29-49
	Gillum, Lester J.	12-19-49
	Hochbich, Henry	5-15-50
	Arnold, William T.	2-22-51
	Zhni, Joseph	11-7-55
	Dudek, Stanley G.	5-17-56
	Gordon, Harold R.	8-14-56
*	Jordan, Hasker	1-2-57
	Banks, Paul W.	3-21-57
	Spishak, John A. Jr.	3-25-57
S	Prosperi, Anthony V.	11-3-59
	Francis, Robert R.	3-29-60
	Schwab, Albert S. Jr.	5-2-60
	Cantrell, Thomas G.	6-13-60
	Battles, Charlie C.	10-24-60
	Jenkins, James E.	11-4-60
	Shaw, Neil	11-7-60
S	Childress, Gerald L.	11-7-60
	Zigler, Robert J.	11-28-60
*	Baker, Paul E.	8-2-61
	Stark [illegible], Andrew	6-10-63
	Schurn, John S.	1-15-64
	Polin, Allan R.	3-2-64
	Beggie, Dominic	3-3-64

SCALER-HAND BRUSH (CONTINUED)

S	Kouvaras, James H.	1-20-65
	Smith, Ronald P.	1-25-65
	Cunsolo, Pietro	2-8-65
	Kotlinski, Henry A.	2-10-65
	Oliver, Robert A.	2-24-65
	Jackson, Kenneth D.	2-25-65
	Sneler, Robert J.	2-25-65
	Millentz, John M.	3-9-65
F	Santilli, Ennio	3-10-65
	Ferraro, Paul F.	4-8-65
	Hubbs, William H.	4-8-65
	Gilchrist, John A.	4-12-65
*	Ramezar, Stephen F. Jr.	5-20-65
	Hildebrand, Robert W.	8-4-65
	Foster, Earl R.	8-5-65
	Wells, Haywood	9-15-65
	Stribling, Ralph Jr.	10-18-65
*	Dentini, Daniel	10-19-65
	Eneloff, Ronald J.	10-26-65
*	Siters, Raymond A.	10-27-65
	Matthews, Keith W.	11-1-65
	Wilczak, Stephen J.	11-15-65
	Donervitch, Eugene H.	11-16-65
	Schellaert, Kenneth A.	11-17-65
	Jackson, James	11-29-65
	Lynch, Robert G.	12-13-65
F	Smith, George F.	1-3-66
	Steele, Clarence	1-3-66
	Whyle, Thomas B. Jr.	1-27-66
	McCullough, Howard S.	4-25-66
	Miller, Edward C.	4-29-66

BEST COPY AVAILABLE

RIGGER

	Bosko, Stepan	9-3-[illegible]
	Budak, Frank	7-25-27
	Deer, Vernon	11-15-30
	Baranosky, Andrew	4-29-31
	Krull, August	5-16-33
	Drevallo, Wesley	6-18-34
	Kiba, George	6-16-36
	Yurko, Andrew Jr.	11-1-36
	Begush, Joseph	6-16-41
	Watters, Edward	10-25-41
	Rectenwald, Walter	7-2-42
	Fuchs, Albert G.	11-18-42
	McCorkle, William	11-25-42
	Obid, Edward	11-30-42
	Sheriff, Raymond L.	2-15-43
	Kuczmarek, Bernard	6-14-43
	Opferman, Charles A.	11-10-47
	Lolley, Richard C.	11-17-47
	Rupert, Melvin L.	11-22-49
	Kevish, Joseph	1-15-51
	Sicher, Guido	1-15-51
	Olenik, John	8-13-51
	Kortzer, Alex	11-12-51
	Sherro, Albert	9-23-52
	Waltenbaugh, Wesley	12-30-52
	Weidner, Harold C.	10-8-54
	Spicak, Joseph P.	7-14-56
	Guyaux, John C.	3-11-57
	Beck, Robert C. Jr.	4-15-57
	[illegible]James, Winston C.	5-22-57
	[illegible]Wilson, Gabriel A.	6-10-57
	[illegible]	7-8-57

RIGGER (CONT'D)

	[illegible]	7-30-60
	[illegible] P.	8-1-60
	[illegible], James E.	8-12-60
	Williams, Theodore R.	8-22-60
	Eccles, Neal	9-12-60
	[illegible]ambert, Anthony	10-24-60
	[illegible]aylor, Theodore R.	3-7-62
	[illegible], Martin G. Jr.	3-21-62
	[illegible], Tedora	5-19-62
	[illegible]Malcolm, Raymond L.	11-8-62
	[illegible], Paul F.	4-8-63
	[illegible], Bernard L.	4-24-63
	[illegible], Joseph J.	2-5-64
	[illegible]Bellman, Thomas W.	2-10-64
	[illegible]Stephens, Richard P.	1-11-65
	[illegible], Robert R.	1-11-65
	[illegible]McMillin, Kenneth F.	1-11-65
	[illegible], Raymond G.	1-11-65
	[illegible], Thomas H. Jr.	1-11-65
	[illegible]Elliot, Roy J.	4-6-65
	[illegible]Scaretti, James A. Jr.	4-12-65
	[illegible]Hillmitz, John M.	4-28-65
	[illegible], Andrew R.	7-6-65
	[illegible], John Jr.	9-13-65
	[illegible]Schacher, Ralph J. Jr.	10-25-65
	[illegible], Ronald	11-1-65
	Hillebrand, Robert W.	11-1-65
	[illegible], Raymond R.	11-8-65
	Reichel, Albert G.	12-8-65
	[illegible], Andrew L. Jr.	1-3-66
	[illegible], Richard T.	1-3-66
	[illegible], Donald R.	1-24-66
	[illegible]	4-4-66
	[illegible]	5-31-66

RIGGER (CONT'D)

	[illegible], James G. Jr.	5-11-66
	[illegible], Barry J.	7-11-66
	[illegible], Michael A.	7-25-66
	[illegible], Daniel G.	8-15-66
	[illegible]Kroll, John	9-5-66
	[illegible], Frederick P.	9-12-66
	[illegible]Taylor, J[illegible] A.	9-19-66
	[illegible]Gobeski, Kenneth W.	11-21-66
	[illegible]Grice, Elmer	11-21-66
	[illegible]Williams, Robert L.	11-21-66

POUNDER

	[illegible]Deschutt, Robert J.	5-6-65
	[illegible]Shuttleworth, Donald F.	1-10-66

SCALER (MUD BRUSH)

	[illegible]	5-25-25
	[illegible]Hannah, John	3-26-29
	[illegible]Macalusso, Joseph	4-12-29
	[illegible]Mahoney, Henry	10-9-29
	[illegible]Dunnamon, Andrew	5-21-30
	[illegible]Cuzan, Elmer	5-22-34
	[illegible], Arthur	8-20-34
	[illegible]Lynch, Michael	1-5-35
	[illegible]Yurko, Andrew Jr.	10-23-35
	[illegible]Sullivan, Frank J.	3-16-36
	[illegible]Hollett, August	6-2-36
	[illegible]Bellomo, Albino D.	6-18-36
	[illegible]Test, Harvey J.	6-25-36
	[illegible]Dubik, John	12-6-37
	[illegible]Dolcin, Donald David	5-14-[illegible]
	[illegible]Evans, George J.	7-29-[illegible]
	[illegible]McCullough, E. D.	9-10-40
	[illegible]Hunt, Michael James	9-24-[illegible]
	[illegible]Sabey, Joseph	1-20-[illegible]

BEST COPY AVAILABLE

SCALER (HAND BRUSH) (CONT'D)

....	Tolino, [illegible]	....	5-4-[illegible]
....	Cold, [illegible]ard	....	8-21-[illegible]2
....	Zeland, Joseph	....	8-29-42
....	Grisham, Jean	....	9-15-42
....	Tuttle, Raymond E.	....	10-23-42
....	Rose, Philip	....	2-8-43
....	Bradham, George A.	....	2-17-43
....	Hinrichs, Robert	....	3-11-43
....	Moreno, Emilio C.	....	5-17-43
....	Lewis, Jethro P.	....	5-24-43
....	Cook, Matthew H.	....	4-17-44
....	Wilson, Sammy	....	10-19-44
....	Green, Robert	....	4-16-45
....	Gubler, Fulton	....	1-9-46
....	Mihalakis, James R.	....	1-16-46
....	Sicher, Guido L.	....	1-16-46
....	[illegible], Albert	....	1-20-47
....	Chandler, Robert C.	....	9-11-47
....	Cymryeh, Michael A.	....	12-27-48
....	Taylor, Charles A.	....	4-17-49
....	Shelby, George	....	6-29-49
....	Collins, Lester J.	....	12-19-49
....	[illegible], Henry	....	5-15-50
....	Arnold, William T.	....	2-22-51
....	Toni, Joseph	....	11-7-55
....	Dulak, Stanley G.	....	5-17-56
....	Gerlach, Harold D.	....	8-21-56

SCALER (HAND BRUSH) (CONT'D)

....	Benton, Paul W.	....	3-21-57
....	Spichek, John A. Jr.	....	3-25-57
....	Pescrari, Anthony V.	....	11-3-59
....	Francis, Robert R.	....	3-29-60
....	Schumb, Albert S. Jr.	....	5-2-60
....	Cantwell, Loomis G.	....	6-13-60
....	Tuttle, Charlie C.	....	10-24-60
....	Jenkins, James E.	....	11-4-60
....	Shaw, Neil	....	11-7-60
....	Calderon, Gerald L.	....	11-7-60
....	[illegible], Paul H.	....	4-2-62
....	Schurr, John S.	....	1-15-64
....	Felix, Allan R.	....	3-2-64
....	Bertie, Dominic	....	3-3-64
....	Kouvaras, James N.	....	1-20-65
....	Smith, Ronald P.	....	1-25-65
....	Cuniolo, Pietro	....	2-8-65
....	Kotlinski, Henry A.	....	2-10-65
....	Oliver, Robert A.	....	2-24-65
....	Jackson, Kenneth D.	....	2-25-65
....	Sneler, Robert J.	....	2-25-65
....	Willentz, John M.	....	3-9-65
....	Sarulli, Ennio	....	3-10-65
....	Farmer, Paul F.	....	4-8-65
....	Hubbs, William N.	....	4-8-65
....	Gilchrist, John A.	....	4-12-65
....	Hildebrand, Robert W.	....	8-4-65
....	Foster, Earl R.	....	8-5-65
....	Wells, Haywood	....	9-15-65

SCALER (HAND BRUSH) (CONT'D)

....	Stricklin, Ralph Jr.	....	10-15-65
....	Diolosi, Ronald J.	....	10-26-65
....	Matthews, Faith V.	....	11-1-65
....	Milazzo, Stephen J.	....	11-15-65
....	Denevitch, Eugene H.	....	11-16-65
....	Lynch, Robert G.	....	12-13-65
....	McCulloch, Howard S.	....	4-28-66
....	Miller, Edward C.	....	4-29-66
....	Forster, Stephen F. Jr.	....	5-20-66
....	Robinson, Sherwood	....	9-12-66
....	Sperry, Edward W.	....	9-13-66
....	Bender, Clifford T.	....	9-19-66
....	[illegible], Daniel	....	10-19-66
....	Sisson, Howard A.	....	10-27-66
....	Turner, James	....	10-31-66
....	Marascia, Ronald F.	....	11-9-66
....	[illegible], Billy	....	11-23-66
....	Alt, David C.	....	11-29-66
....	Vrchac, John Jr.	....	12-20-66
....	Burger, Charles S.	....	11-23-66
....	St. Clair, Edward L.	....	12-5-66
....	Fiato, John F.	....	12-12-66
....	[illegible], Michael Jr.	....	12-12-66
....	[illegible], Robert E.	....	12-12-66
....	[illegible], Joseph L.	....	12-12-66
....	[illegible], Anthony	....	12-13-66
....	[illegible]	....	12-14-66
....	Stephan, David L.	....	12-16-66
....	Hoyle, Thomas R. Jr.	....	5-8-67

SENIORITY REGISTER DRAVO CORPORATION ENGINEERING WORKS DIVISION - HEAVY METALS - AUGUST 1, 1968

RIGGER

Kosko, Stephen	5-3-27
Hedak, Frank	7-25-27
Burnecsky, Andrew	4-29-31
Krull, August	5-16-33
Dremallo, Chester	6-18-34
Mike, George	5-16-36
Yurko, Andrew Jr.	11-1-36
Segada, Joseph	6-16-41
Watters, Edward	10-25-41
Rectenwald, Walter	7-2-42
Fuchs, Albert C.	11-18-42
McCorkle, William	11-25-42
Odid, Edward	11-30-42
Sheriff, Raymond L.	2-15-43
Kosanovich, Bernard	6-14-43
Lalley, Richard C.	11-17-47
Opferman, Charles A.	11-10-48
Rupert, Melvin L.	11-22-49
Kevish, Joseph	1-15-51
Sicher, Guido	1-15-51
Cionik, John	8-13-51
Mortner, Alex	11-12-51
Sheep, Albert	9-23-52
Waltonbaugh, Wesley	12-30-53
Weidner, Harold C.	10-8-55
Cooney, John C.	3-11-57
Beck, Egbert C. Jr.	4-15-57
Jones, Winston C.	5-22-57
Wilson, Johnnie A.	6-10-57
Dolchak, John A. Jr.	7-8-57
Spicak, Joseph T.	7-14-57

RIGGER (CONT'D)

Quaglieri, William J.	7-30-60
Paulik, John P.	8-1-60
Miller, James T.	8-12-60
Williams, Theodore R.	8-22-60
Easton, Neal	9-12-60
Dewhurst, Andrew	10-24-60
Taylor, Theodore R.	3-7-62
Patton, Martin C. Jr.	3-21-62
Lavelle, Carl P.	4-9-63
Grubb, Raymond L.	4-24-63
Foord, William	5-12-63
Hayes, Harold J.	5-5-64
Dickson, Morris W.	2-10-64
Stenberg, Richard E.	1-11-65
Nemeth, Robert P.	1-11-65
Merrillees, Kenneth F.	1-11-65
Fishburne, Raymond C.	1-11-65
Wachat, Roy J.	4-6-65
Delcamatti, James A. Jr.	4-12-65
Williams, John M.	4-28-65
Nolan, Arthur R.	7-6-65
Arbenitz, John Jr.	8-23-65
Oxley, Harold	11-1-65
Williams, Robert W.	11-1-65
Crawford, Ronald T.	1-6-66
Abbott, Donald R.	1-24-66
Metz, Gene H.	4-28-66
Didier, Robert H.	5-31-66

RIGGER (CONT'D)

Bouda, Joseph G. Jr.	5-31-66
Holtan, Frank J.	7-11-66
Solarte, Michael A.	7-25-66
Taylor, James A.	9-19-66
Kroll, John	9-5-67

ROUTER

Dewhurst, Robert J.	5-6-65
Chattlesworth, Donald S.	1-10-66
Loadding, Edward H.	9-11-67

SCALER (WIND BRUSH)

Cottlob, George	5-25-25
Murdock, John	3-25-29
Rheinfrank, Joseph	4-12-29
Williams, Andrew	10-9-29
Burnecsky, Andrew	5-21-30
Cuppa, Horace	5-22-34
Fox, Andrew	8-20-34
Krebs, Andrew Jr.	10-23-35
Popko, Michael	1-5-36
Balthardt, Frank J.	3-15-36
Hudson, August	6-2-36
Balthardt, Albert D.	6-18-36
Krebs, [illegible] J.	6-25-36
Krebs, John	12-6-37
Dolchs, Bernard David	5-14-40
Dixon, George J.	7-29-40
Blair, Michael James	9-24-40
McCullough, E. D.	7-10-41
Daly, Joseph	1-20-42

SENIORITY REGISTER DRAVO CORPORATION ENGINEERING WORKS DIVISION - HEAVY METALS - AUGUST 1, 1968

SCALER (HAND BRUSH) (CONT'D)

Obld, Edward	8-21-42
Roleck, Joseph	8-29-42
Crichton, John	9-15-42
Irvin, Durward E.	10-26-42
Yost, Philip	2-8-43
Middleton, Robert	3-11-43
Sloan, Dallas C.	5-17-43
Lorio, Johnny P.	5-[illegible]-43
Deib, Matthew H.	4-17-44
Wilson, Sonny	10-10-44
Craig, Robert	4-16-45
Cutler, Fulton	1-9-46
Littlejohn, James R.	1-15-46
Stoker, Curtis L.	1-16-46
Mallory, Albert	1-20-47
Cumbland, Robert C.	2-11-47
Darnell, Lemuel A.	12-27-48
Bayless, Charles A.	4-17-49
Taylor, Forrest	6-20-49
Gillum, Jesse L.	12-16-49
Wachacha, Harry	5-15-50
Arnold, William T.	2-22-51
Zhai, Joseph	11-7-55
Pugh, Stanley G.	5-17-56
Gordon, Harold R.	8-16-56

SCALER (HAND BRUSH) (CONT'D)

Banks, Paul W.	3-21-57
Goldbeck, John A. Jr.	3-25-57
Prescott, Anthony V.	11-3-59
Darnell, Robert R.	3-30-60
Schmidt, Albert C. Jr.	5-2-60
Stubbs, Charlie C.	10-24-60
Jenkins, Glenn B.	11-6-60
Gipp, Phil	11-7-60
Chilcoat, Donald L.	11-7-60
Davis, Paul E.	8-2-61
Schmidt, John S.	1-15-64
Davis, Dr. Julie	3-3-64
Hopkins, Jesse W.	1-20-65
Smith, Donald R.	1-25-65
Arnold, Charles	2-8-65
Wattenbarger, Percy A.	2-10-65
Gilmer, Robert A.	2-24-65
Jackson, Kenneth D.	2-25-65
Taylor, Robert L.	2-26-65
Williams, Brian W.	3-8-65
Cunningham, Charles	3-10-65
Schneider, Karl D.	4-8-65
Hughes, William W.	4-8-65
Chevalier, John A.	4-12-65
Middlecoat, Robert W.	8-4-65
Barlow, Paul R.	8-5-65
Wells, Howard	9-15-65

SCALER (HAND BRUSH) (CONT'D)

Stebbins, Ralph Jr.	10-18-65
Topaloff, Donald J.	10-25-65
Milosch, Stephen F.	11-15-65
Dzierwulski, Eugene E.	11-15-65
Lemah, Robert C.	12-13-65
Chilcoat, Howard S.	1-28-66
Miller, Richard C.	4-20-66
Turner, Jimmy	10-31-66
Wiesenthal, Donald F.	11-8-66
Mathis, John Jr.	11-28-66
Sperow, Richard W.	12-2-66
St. Clair, Howard L.	12-5-66
Milewski, Michael Jr.	12-12-66
Bellon, Anthony	1-13-67
[illegible]r, Stephen F. Jr.	5-20-67
Sitton, Raymond A.	10-27-67
Kile, Cecil C.	6-5-68
Reynolds, Israel A.	6-6-68
Gonzales, Marvin B.	6-10-68
Stevens, Corey	6-18-68
Corrente, Frank J.	6-19-68
Vlasinsky, Julius J.	7-18-68
Coulstig, Ron D.	7-19-68

ANSWERS TO INTERROGATORIES TWELVE (12) AND THIRTEEN (13) ARE CONTAINED IN THE DOCUMENT ATTACHED TO THIS PAGE.

QUESTION #12 - USE 1st 2 COLUMNS

QUESTION #13 - USE REMAINING COLUMNS

NAME	ADDRESS	SENIORITY DATE	WEEKS WORKED		VACATION CREDITS		LO - LAYOFF D-DIS RH - REHIRE Q - QUIT
			1967	1968	1967	1968	
Wells, Haywood	1517 N. Homewood Ave., Pittsburgh, Pa. 15208	9-15-65	50		64		Q - 8-9-68
Stribling, Ralph Jr.	828 Whiteside Rd. Pittsburgh, Pa. 15219	10-18-65	51	49	64	76	
Emeloff, Ronald J.	2010½ Forbes Ave. Pittsburgh, Pa. 15219	10-26-65	46	49	64	72	
Wilczak, Stephen J.	1887 Oakbine Ave. Coraopolis, Pa. 15108	11-15-65	51	48	64	72	
Lynch, Robert G.	1134 Wayne Ave. McKees Rocks, Pa. 15136	12-13-65	46	48	64	72	
McCullough, Howard S.	800 Dowell Ave. Monaca, Pa.	4-[illegible]-66	51	49	56	64	
Robinson, Sherwood	1046 Broadview Dr. Pittsburgh, Pa. 15207	9-12-66	41		56		D - 2-21-68
Sperow, Edward	148 William Circle McKees Rocks, Pa. 15136	9-13-66	50		56		Transferred Salary 6-21-68
Pander, Gerald J.	3429 California Ave. Pittsburgh, Pa. 15212	9-19-66	52		56		Q - 1-26-68
Maraccini, Ronald F.	124 Sebring Ave. Pittsburgh, Pa. 15216	11-09-66	52	40	56	64	LO 12-[illegible]-67, RH 2-5-68, LO 4-5-68 RH 5-13-68
Jablonski, Michael Jr.	25 Highland Ave. Burgettstown, Pa.	12-12-66	45	31	56	64	LO 7-13-67, RH 8-22-67, LO 12-6-[illegible] RH 5-15-68
Belloma, Anthony	J-1 Neville Manor Pittsburgh, Pa. 15225	12-13-66	41	30	56	60	LO 4-14-67, RH 4-24-67, LO 7-5-67 RH 9-5-67, LO 10-13-67, RH 5-20-6[illegible]

BEST COPY AVAILABLE

ANSWER TO INTERROGATORIES SIXTEEN (16)
IS PROVIDED BY THE AGREEMENT
ATTACHED TO THIS PAGE

AGREEMENT

BETWEEN

DRAVO CORPORATION

Engineering Works Division

Neville Island

Heavy Metals Plant

Pittsburgh, Pa. 15225

AND

INDUSTRIAL UNION OF MARINE
AND SHIPBUILDING WORKERS
OF AMERICA

Local Union No. 61, A.F.L.-C.I.O.

(Union Label)

1966-1968

AGREEMENT

THIS AGREEMENT, executed this 7th day of October, 1966, is entered into by and among ENGINEERING WORKS DIVISION OF DRAVO CORPORATION at its Neville Island Heavy Metals Plant, its successors or assigns, hereinafter referred to as the "Company", party of the first part, and the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, A.F.L.-C.I.O., and the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, A.F.L.-C.I.O., LOCAL NO. 61, both acting for and on behalf of themselves and LOCAL 61 members, present and future, in the employ of the company, hereinafter referred to as the "Union," party of the second part.

ARTICLE I

INTENT

It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationships between the employees and the Company, and will set forth herein the basic agreement covering rates of pay, hours of work, and conditions of employment to be observed between the parties hereto.

• • • •

ARTICLE V

DISCHARGE OF EMPLOYEES

Section 1

The right to discharge or discipline employees shall be the prerogative of the Company, except that no discharge or disciplinary action shall be made without proper cause.

Section 2

Violations of the Plant Regulations, as written by the Company, is considered by the Company to be within the meaning of "proper cause." The Union does not participate in making these rules, therefore, it reserves the right to contest discharge cases arising out of the application of the rules and whether action taken under said rules constitutes proper cause.

All discharges or disciplinary actions arising under the terms of this Agreement are subject to the grievance procedure, including arbitration.

Section 3

Whenever an employee is suspended or discharged, the Industrial Relations Department shall so notify the employee's Union representative before the employee actually leaves the plant.

• • • •

ARTICLE VII

WAGES, WORKWEEK AND OVERTIME

Section 1

Basic hourly wage rates for those employees of the Company represented by the Union shall be as specified in Appendix "A", attached hereto and made a part hereof, and shall continue as such until the expiration of this Agreement.

If the August, 1967 United States Department of Labor Cost of Living Index is one point or more above the August, 1966 Index, the Company will grant the employees a wage increase of two (2) cents an hour effective October 1, 1967.

The rates of pay apply to both male and female employees.

Section 2

It is hereby agreed that work in excess of eight (8) hours per day or forty (40) hours per week shall be compensated by payment of overtime premiums as hereinafter set forth. Whenever they are working a forty (40) hour week, the workweek for employees other than boiler firemen shall consist of five (5) eight (8) hour shifts, from Monday to Friday, inclusive.

Section 3

The following overtime provisions shall apply to employees other than boiler firemen:

For all work in excess of eight (8) hours per day and for all work between the hours of 12:24 a.m. Saturday and 12:24 a.m. Sunday, an employee shall be paid one and one-half (1½) times the established hourly rate.

Double the established hourly rate shall be paid for hours worked between the hours of 12:24 a.m. Sunday and 12:24 a.m. Monday.

Section 4

The following overtime provisions shall apply to boiler firemen:

All work performed in excess of eight (8) hours per day shall be paid for at the rate of one and one-half (1½) times the established hourly rate.

One and one-half (1½) times the established hourly rate shall be paid for hours worked on the sixth (6th) shift in any regularly established workweek.

Double the established hourly rate shall be paid for hours worked beyond 12:24 A.M. of the day following the start of the sixth (6th) shift and for hours worked in the seventh (7th) shift in any regularly established workweek.

Section 5

In computing the number of hours or shifts worked by an employee for purposes of determining overtime pay, holiday pay and vacation pay, the following shall be considered hours or shifts worked:

a. Shifts or parts of shifts lost by employees when unable to work on account of injuries sustained by accident arising out of and in the course of their employment, provided that prompt reports of such injuries are made to the Company or its agents. The decision of the doctor shall be final in deciding when a man is unable to work.

b. Shifts or parts of shifts lost by employees on days when they report to work as required, but are not put to work or are sent home before the end of the shift for any reason beyond the employee's control.

c. Shifts lost because of holiday shutdowns.

d. Shifts lost because of absence on jury duty for which the employee is paid under Section 10 of this Article.

e. Shifts lost because of absence on union business paid for by the Union in connection with contracts

with Dravo Corporation or its Subsidiaries provided the Union furnishes the Industrial Relations Manager in advance of such absence with a letter listing those who are going to be absent.

f. Hours lost by Officers of the Union and the members of the Negotiating, Grievance and Pension Committees while out of the Plant on Union business connected with Dravo Corporation or its Subsidiaries provided the Union furnishes the Industrial Relations Manager in advance of such absences a letter listing those who are going to be absent or such absence is in accordance with a specific provision of this Agreement.

g. Shifts lost because of absence on military reserve duty for periods of up to and including two (2) weeks.

Section 6

Whenever an employee is required to work more than eight (8) hours in any day the employee shall continue to be paid at the rate of time and one-half (1½) for all hours worked in excess of eight (8) until he is given a rest period of at least one (1) full plant shift subsequent to his ceasing work.

Section 7

a. *Holidays Not Worked*

Eligible employees, including boiler firemen, shall be allowed eight (8) hours' pay at their regular straight time base hourly rate for each of the following holidays not worked regardless of the day on which they fall:

New Year's Day	Labor Day
Good Friday	General Election Day
Memorial Day	Thanksgiving Day
Independence Day	Christmas Day

December 24 (Except when Christmas falls on Thursday when it will be December 26)

Holidays occurring on Sunday will be celebrated on Monday except December 24 and as noted in Paragraph C.

If the holiday occurs within the time that the eligible employee is absent on his regular scheduled vacation, he will be paid eight (8) hours pay at his regular straight time base hourly rate for such holiday in addition to his vacation allowance.

Holidays occurring on Saturday will be paid to employees who are absent because of jury duty or millitary reserve duty where the Company is making up the difference between his regular base pay of 40 hours and compensation received for such service. There will be no compensation for holidays occurring or celebrated Monday through Friday.

To be eligible for holiday pay each employee shall work the regularly plant scheduled day before and the regularly plant scheduled day after the holiday or day celebrated as such. In addition to working the full shift, only under the following conditions will the employee be considered as having worked if he (1) has reported for work on the scheduled work day and is sent home because no work is available and has been granted reporting pay, or (2) leaves work early with approval of his supervisor, or (3) is absent up to twelve (12) months immediately following date of accident because of an injury received in the plant, or (4) is late for work, or (5) is off on vacation, or (6) is absent due to illness duly certified by the attending physician; provided, however, that such absence may occur, for the purpose of this immediate paragraph, only once during the period of the illness; said period of illness shall be deemed to have ended upon the employee's return to work.

b. *Holidays Worked*

Three (3) times the established base hourly rate shall be paid for all hours actually worked from 12:24 a.m. to 12:24 a.m. on the above holidays. Should the employee work less than eight (8) hours on the holiday

and would have been otherwise eligible for holiday pay as provided above, he will receive, in addition to three (3) times his established base hourly rate for hours actually worked, pay at his regular straight time base hourly rate for eight (8) hours minus the number of hours he did work on such holiday.

c. *Boiler Firemen*

Boiler Firemen, who work on a shift basis, shall be paid for a "holiday worked" when the holiday occurs on Sunday and he is scheduled to work that day but not on Monday. If he is scheduled to work both days, he will be paid as a "holiday worked" for one day only—Monday.

Section 8

When more than one (1) type of premium compensation is applicable to the same hours of work under Sections 2, 3, 4, 5, 7 and/or 11 of this Article, only one (1) —the highest—premium shall be paid.

Section 9

A premium allowance of seven percent (7%), but in no case more than twenty cents (20¢) per hour, shall be paid to employees on the second and third shifts. This premium is applied to the employee's total earnings, including overtime, allowance and incentive earnings in the departments where such incentive plans are in effect. This also applies to first shift men transferred to the second or third shift and to second or third shift men temporarily transferred to the first shift for not more than one (1) week.

Section 10

An employee who presents notice of call for jury service will be excused from work on the days he serves and

for each day he serves on the jury on which he otherwise would have worked he shall receive the difference between eight (8) times his straight time base hourly rate and the payment he receives for such jury service. The employee shall present proof of service and of the amount of pay received therefor in order to receive above allowance.

Section 11

When it is necessary to call a man out on his normal shift on a premium day (Saturday, Sunday, or Holiday) he shall be compensated as follows: if he works less than four (4) hours on his normal shift and is required to work all or the major portion (four (4) hours or more) of the next subsequent shift or shifts he will receive credit for a change in shift, which would result in his being paid at the premium day rate plus one-half (½) his base hourly rate for all hours worked; if he works four (4) hours or more on his normal shift and is required to work part or all of the next subsequent shift or shifts, credit for change of shift shall not apply and he will receive only the premium pay for that day.

Section 12

Nothing in this Article is to be construed as a guarantee of minimum hours per day, per week or per month.

Section 13

When an employee is off work due to a death in his immediate family and actually attends the funeral, the Company will pay the employee at his base hourly rate eight hours per day for up to a total of three consecutive days, however, if the death occurs on Thursday and the funeral is on Monday the employee will be paid for Friday and Monday, beginning with the day after death

to and including the day of the funeral with no payment to be made for any of the three days which is a Saturday, Sunday, Paid Holiday, part of his vacation, or occurs while he is not working. For purposes of this Section "immediate family" is spouse, children, parent, sister, brother or parent-in law.

• • • •

ARTICLE X

SENIORITY

Section 1

"Seniority" is the right of preference in layoffs or rehiring, measured by length of service in a job classification at the Heavy Metals Plant, as hereinafter more particularly described.

A reduction of the working force for a period of less than one calendar week or for reasons beyond the control of the Company shall not be considered a layoff. Such reductions of the working force shall be governed as nearly as practical by the application of seniority to the department and or shift that is being reduced. These same principles of reduction shall apply to a gang except that such reduction shall not be for a period of more than one (1) calendar day. Efforts will be made to maintain maximum operations and to utilize those having greatest seniority during such period. The Company shall give preference to employees who have given long and faithful service in the employ of the Company for the work they are able to do.

A rehiring is the re-employment of persons who have been previously laid off.

Section 2

For purposes of this Article, the job classification shall be the payroll classification of the Company as set forth

in Appendix "A", attached to and made a part of this Agreement. Where there are two (2) or more rates of pay for a payroll classification, the total of said ratings shall comprise one (1) job classification.

Example: Laborer shall be one job classification.

Handyman (in each particular craft), 1st. class, 2nd. class, shall be one job classification.

Painter, 1st. class, 2nd. class, 3rd. class, shall be one job classification.

In the interpretation and application of this Article the parties will be governed by the Award and Opinion of Lawrence R. Guild, Impartial Arbitrator, dated December 4, 1944.

First class rates will be the determining factor in comparison of jobs for determination of higher or lower job classifications for purposes of this Article.

Section 3

A new employee shall not have or accumulate seniority until he has worked each of thirty (30) accumulated days, which, however, must be accumulated within four (4) months of date of hire, in the job classification in which he was hired and during this thirty (30) working day period the Company shall have the right to terminate his employment for any reason whatever. The seniority of employees retained at the end of said probationary period shall date from the beginning of the probationary period.

If an employee is transferred to or promoted to an equal or higher job classification prior to obtaining seniority in his hiring classification, the working days accumulated toward seniority in the new classification shall also be counted toward seniority in the classification in which he was hired.

An employee transferred or promoted to a new job classification shall not have or accumulate seniority in the new job classification until he has worked each of thirty

(30) accumulated days at the end of which he shall have and accumulate seniority from the beginning of the thirty (30) accumulated day period. The thirty (30) day probationary period shall not apply to reclassifications resulting from the grievance procedure or arbitration awards.

Three of more consecutive days of work (four (4) hours or more will constitute a day of work for the purpose of this Section only) in a particular job classification shall count toward the thirty (30) accumulated days; provided, however, such thirty (30) days must be accumulated during the period of July 1 to June 30. When employees are transferred or promoted for three or more consecutive days (four (4) hours or more will constitute a day of work for purposes of this Section only) to fill a vacancy caused by absence of the regular employee on account of vacation or sickness and the promoted or transferred employees do not have seniority in the classification, such time shall count as part of the accumulated thirty (30) days; however, when the replaced employee returns to work the temporary employees shall be returned to their former jobs in accordance with their seniority in those jobs without liability on the part of the Company under Article VI of this Agreement.

When a layoff occurs in the promoted or transferred employee's most recent former classification during his probationary period in another classification, he shall be laid off in accordance with his seniority in his most recent former classification despite the fact he is a probationary employee in another classification and is so rated on the payroll. If a layoff occurs in the probationary classification during his probationary period, he shall be the first laid off in that classification but shall have the right to return to his most recent former classification in accordance with his seniority in that classification.

Employees shall be retained to the extent possible in their current departments and work assignments in conformity with the provisions of this Article.

Employees shall be retained, hired or rehired in accordance with the seniority of employees in their respective job classifications at the Heavy Metals Plant,

subject to the limitations set forth in this Article. Where two (2) or more employees in the same job classification entered that classification on the same date, their relative seniority shall be determined by their total length of service at the Heavy Metals Plant. If their total length of service at the Heavy Metals Plant is the same, then relative seniority shall be determined alphabetically with "A" having the greatest seniority; then "B"; etc.

In order to better stabilize employment at the Heavy Metals Plant, every effort will be made to provide full employment for regular employees rather than make frequent layoffs and rehires. Whenever work occurs that might be done by employees who are laid off being called back to work for a week or less, but the work can be performed by employees in other classifications currently working in the Heavy Metals Plant, the work may be performed by the employees already working in the department who have seniority in the classification in which the work is to be performed; however, if none having such seniority are currently working in the department any other employee may be assigned to the work rather than by calling back additional employees. It is understood temporary assignments for less than a day shall not be restricted. However, no employee shall be kept out of the Heavy Metals Plant under this paragraph for more than five (5) work days at any one time, nor shall this clause be used to keep employees out of the Heavy Metals Plant indefinitely.

Section 4

It is the intent of the Company to "promote from within" wherever possible. To this end, the following procedure is established to provide opportunity for advancement of employees:

Each employee will be given the opportunity to submit a questionnaire provided by the Company, or other written form, in which he will set forth the higher skilled or graded job classification to which he desires to be promoted and the skills he possesses. Such questionnaire shall be replaced at least annually by the employee to reflect current desires and abilities.

The Company and the Union shall each appoint three (3) persons to a Committee who will meet periodically, but no less than three times a year to evaluate the questionnaires and endeavor to determine relative order in which applicants will be given the opportunity to be promoted to higher skilled or graded classifications. Should the Committe be unable to agree with respect to a given employee's qualification or position on the list of applicants the Company shall make the decision.

Employees on the Committee shall be paid for the time spent attending evaluation meetings scheduled by the Manager of Industrial Relations but in no case more than sixteen (16) hours to any individual or a total payment of forty-eight hours to the Union Committee at any one evaluation meeting which may or may not extend over two days. Employees attending meetings other than evaluation meetings will be governed by Article XI, Section 5.

When no eligible employee is available to fill an existing vacancy, the Company shall secure qualified personnel from any other source.

All disputes arising under the terms of this Section are subject to the grievance procedure, including arbitration. However, no liability shall exist on the part of the Company for action taken under this Section except from no more than forty-five (45) days prior to final decision of any grievance filed with respect to such action which reverses the action taken by the Company.

Section 5

An employee who has been transferred or promoted from one job to another in the Heavy Metals Plant within the bargaining unit shall retain and accumulate seniority in his previous job classifications. An employee who has been transferred or promoted to a job in the Engineering Works Division outside the bargaining unit or an employee permanently transferred to locations other than Neville Island shall retain and accumulate seniority in his previous job classifications for a maximum of five (5) years from date of transfer and thereafter shall retain accumulated seniority only. Effective October 1, 1966, those currently working outside the bargaining unit who were transferred five or more years prior to October 1, 1966 shall retain their accumulated seniority to October 1, 1966 only and those transferred within five years prior to October 1, 1966 shall continue to accumulate seniority for a maximum of five years from date of transfer and then shall retain.

Seniority in any new job classification to which an employee is permanently transferred or promoted shall date only from the date of his entry into the new classification.

Example: An employee was hired on January 1, 1938 in the Labor Department as a Laborer.

On January 1, 1939, he was transferred to the Sheet Metal Shop as a Laborer.

On July 1, 1939, he was transferred to the Pipe Shop as a Laborer.

On January 1, 1940, he was promoted to the new job classification of Drill Press Operator (Machine Shop).

On January 1, 1942, he was transferred to the new job classification of Machine Operator (Machine Shop).

On January 1, 1943 he was transferred to the new job classification of Machine Operator (Structural Shop).

On January 1, 1944, he was promoted to the new job classification of Inside Machinist (Machine Shop).

On January 1, 1945, he was transferred to the new job classification of Inside Machinist (Repair Shop) where he remained until January 1, 1947.

As of January 1, 1947, his total seniority in each job classification was as follows:

Job Classification	*As of January 1, 1947 Total Seniority in Each Job Classification*
Laborer	9 years from 1/1/38
Drill Press Operator (Machine Shop)	7 years from 1/1/40
Machine Operator (Machine Shop)	5 years from 1/1/42
Machine Operator (Structural Shop)	4 years from 1/1/43
Inside Machinist (Machine Shop)	3 years from 1/1/44
Inside Machinist (Repair Shop)	2 years from 1/1/45

Those employees having seniority in the Heavy Metals Plant, Engineering Works Division on the effective date of this agreement and working in the Light Metals Plant, Fabricated Products Division, shall continue to retain and accumulate seniority in the Heavy Metals Plant, Engineering Works Division.

It is mutually agreed that any employee of the Engineering Works Division, Heavy Metals Plant, who refuses a recall or transfer or assignment to a higher job classification in which he has seniority rights and chooses to remain in a lower job classification shall sign a seniority waiver thereby waiving his immediate bumping rights into such higher job classification and relieving the Company of any liability for the difference in rates of pay for the period he does not work at the higher job classification as a result of the waiver and his seniority in the waived classification shall be retained but not accumulated until such time as he actually returns to work in the waived classification after filing revocation of the waiver as provided in the next paragraph. However, where the rate of pay received by an employee in a higher job classification is less than the rate of pay received by the employee in a lower job classification, the employee will not be required to sign a waiver in the higher job classification if he chooses to remain in the lower job classification. When an employee is currently working in the

Heavy Metals Plant and chooses to invoke his seniority in a lower job classification because he is unable to perform his duties in higher job classification, he may sign a waiver providing he is not displacing another employee currently working in the lower classification. Employees temporarily assigned to other classifications shall not be required to sign a waiver covering such temporary assignment. Employees who have rescinded their waivers prior to August 1, 1954 but have not been placed at work in one of their higher waived job classification as of August 1, 1954 will have their accumulated seniority in the higher waived job classifications retained but not accumulated from August 1, 1954 until they do return to work in the waived classifications.

It is further agreed that the employee shall forfeit all bumping rights in the waived classification until he has notified both the Company and the Union in writing of his desire to invoke his rights in the waived classification and he must wait until an opening ocurs in the classification, after receipt of written notification, at which time he shall be given the first opportunity to invoke his rights in the classification; if, however, the employee is being laid off in his current job classification, he may invoke his retained waived seniority upon five (5) days' notice to the Company of intention to exercise his seniority rights.

It is further agreed that the immediately preceding two paragraphs apply to those employees who were on the active payroll as of September 27, 1957 and those hired subsequent to that date. Waivers signed prior to January 21, 1949 by employees out of service on January 21, 1949 shall not be affected by this Agreement and their waived seniority remains forfeited.

Nothing in the immediately preceding three paragraphs is to be construed as being applicable to shift transfers or transfers from one department to another.

Section 6

Where no work is available to any employee in his present job classification, he may invoke his seniority in any other job classification in which he has sufficient

seniority to be employed at the expiration of the notice of layoff required to be given the displaced employee under Article VI of this Agreement. Where an employee is about to be laid off because no work is available to him in his present job classification, he shall be notified of his "bumping" rights, (i.e., his right to be transferred to former job classifications) and he may invoke his right to be transferred to such former classification in the Heavy Metals Plant or the Fabricated Products Division, Light Metals Plant, in which case the transfer shall be made at the expiration of the notice of layoff required to be given the displaced employee under Article VI of this Agreement, provided, however, that an employee, who, on being given his notice of layoff, immediately invokes his bumping rights shall not lose more than one (1) day's work by reason of such notice to the displaced employee.

Whenever an employee is laid off and out of the Heavy Metals Plant, he shall be given a notice for rehire in any job classification in which he has sufficient seniority to be rehired when such work first becomes available. Whenever such an employee is notified to report in any job classification other than his highest job classification as defined in Section 2, and does not report for work or present a reasonable excuse within five (5) days, he shall not be entitled to any further notices to report in the job classification for which he was notified to report or any other job classification of equal or lower pay, however, the employee shall have the right to invoke such seniority if he has sufficient seniority to be employed and gives the Company at least five (5) working days' notice in order that the displaced employee may be given the notice required under Article VI. Prior to the return of laid off employees during the five (5) day reporting period, the Company may use any workers available to do the type of work for which they are notified to report, provided that notice to return to work has been mailed to some eligible employees at least five (5) days prior to the start of such work.

Section 7

Employees shall lose all seniority rights in all job classifications in which they have such seniority rights if:

a. They voluntarily terminate or quit.

b. They are discharged for proper cause.

c. They do not report for work during a period of layoff out of the Heavy Metals Plant when notified to report for work in their highest job classification unless within five (5) days they present a reasonable excuse. An employee's highest job classification means the, or one of the, job classifications in which the first class rate is the highest.

d. Employees hired as new employees on or after October 1, 1961 who had thirty (30) days' to three (3) years' seniority at time of layoff and have been laid off and out of the Heavy Metals Plant for a period of six (6) months or more; however, if such employee is re-employed within one (1) year after expiration of such six (6) months, in the same classification in which he was laid off or satisfactorily completes the thirty (30) day probationary period after reemployment if rehired in a new classification, the employee will have added to his seniority all unbroken service during his last previous employment prior to being laid off or they had three (3) years' to ten (10) years' seniority at time of layoff and have been laid off and out of the Heavy Metals Plant for thirteen (13) months or more, or they had ten (10) or more years' seniority at time of layoff and have been laid off and out of the Heavy Metals Plant for twenty-four (24) months or more.

Employees hired prior to October 1, 1961 who had sixty (60) days' to ten (10) years' seniority at time of layoff and have been laid off and out of the Heavy Metals Plant for thirteen (13) months or more, or they had ten (10) or more years' seniority at time of layoff and have been

laid off and out of the Heavy Metals Plant for twenty-four (24) months or more.

Length of retention of seniority rights shall be determined solely in accordance with the employees' seniority at time of layoff.

e. They are absent from work without explanation for a period of five (5) work days. Where there is good cause for such absence, the reason for the absence may be explained after the end of the five (5) days without loss of seniority.

Section 8

Absences because of illness or injury or periods when an employee is unable to perform his higher job classification work because of illness or injury but is employed in a lower job classification shall not affect seniority rights and there will be no liability for the difference in rates of pay on the part of the Company while the employee is working in the lower job classification; however, after a period of eighteen (18) months in cases of employees having up to ten (10) years' seniority as of last day worked prior to such sickness or injury or after a period of twenty-four (24) months in cases of employees having ten (10) or more years' seniority as of last day worked prior to such sickness or injury, seniority shall be retained but not accumulated. Should this employee working in a lower job classification wish to return to his higher job classification, he shall be permitted to do so provided he shall notify the Manager of Industrial Relations at least five (5) work days prior to the date he wishes to return to the higher job classification in which he has seniority rights. In cases involving occupational injury or occupational disease suffered during the course of employment with the Company, seniority shall be accumulated but all other conditions of this paragraph will apply.

An employee who is granted a leave of absence shall retain and accumulate seniority for the period of the leave of absence. However, an employee who does not return to work within ten (10) days after the expiration of a

leave of absence shall be considered to have quit his employment at the expiration of the leave of absence.

Any employee incapacitated by compensable injury or compensable occupational disease while in the employ of the Company to the extent of being unable to do his regular work may be employed in any other work in the Heavy Metals Plant that he can do without regard to any seniority provisions of this Agreement except that such employee will not cause the layoff of anyone working in the Heavy Metals Plant and will not acquire seniority in such classification. For each incapacitated employee working out of classification an employee laid off in that classification and out of the plant shall have the period of his retention and accumulation of seniority extended by the period the incapacitated employee works in the classification. The incapacitated employee may only be "bumped out" by an employee having greater seniority in the assigned classification who is currently working in the Heavy Metals Plant and exercises his rights at the time of layoff in a higher classification.

Section 9

In order to promote efficient administration of this contract and to minimize any misunderstandings as to its meaning, it is the policy of the Company and the Union to have it administered by the same people throughout its term. To this end, top seniority is provided for the following Union representatives.

Each of the following representatives of Local No. 61 shall have top seniority rights in the job classification he holds at the time of his election or appointment, or any lower paid job classification in which he has previously been employed when work is not available in the job classification he held at the time of his election or appointment, so long as he is able to do the work, for his term of office.

Members of the Negotiating Committee, not in excess of seven (7); Grievance Committeemen, not in excess of five (5); Stewards, not in excess of one (1) for each department on the day shift and if on the second or third shift a department shall regularly employ thirty

(30) or more employees, one (1) Steward shall be allowed in such department on the shift or shifts employing thirty (30) or more employees; other Officers of the Union, not in excess of eight (8).

The Union shall promptly notify the Industrial Relations Manager of the Company in writing of the employees who have or who have ceased to have such top seniority rights.

Section 10

An employee inducted into the Armed Forces of the United States shall be given the minimum reemployment rights granted him under the Selective Service Act as amended.

If, at the time he applies for re-employment under the terms of the above-mentioned Act, his seniority is not sufficient for him to be re-employed, he shall be considered as being laid off as of the day following his discharge from the service regardless of the date on which he actually applies for re-employment.

Section 11

The Union will supply the Industrial Relations Manager with a list of employees desiring a change in shift. When openings occur on these shifts, the employees so listed will be transferred in order of seniority among those on the list, provided such transfer will not disrupt the operation of either shift, but in no case, provided such openings exist, shall an employee be refused a transfer from one shift to another shift in the same job classification for more than four (4) weeks because of such disruption. Whenever such changes are made, no right shall exist under Article XV, Section 1, of this Agreement.

Section 12

The Company shall employ not more than one (1) apprentice for each five (5) machinists, other mechanics in various trades, and specialists. Apprenticeship shall be for four (4) years except machinists which will be

three (3) years. Apprentices shall have no seniority rights during the term of their apprenticeship and may be discharged at any time that the Company determines that the apprentice does not display proper aptitude for the trade. Apprentices may be assigned to do productive work but shall not be assigned to work for which there is a governmental requirement that such work be certified to or signed for by a mechanic, except under supervision of a mechanic qualified to sign for such work. Regular apprentices shall not be affected because of any layoff or other employees; provided, that said ratio shall not be exceeded. When an apprentice has completed his course and received a certificate certifying that he has learned his trade and is assigned to a particular job classification within that trade, he shall have up to four (4) years' accumulated seniority as a Helper in that classification dependent upon his length of service as an apprentice.

Section 13

In each instance where a job classification in Appendix "A" of this Agreement supersedes a job classification set forth in Appendix "A" (Job Classifications and Wage Rates) of the collective bargaining agreement dated September 7, 1945 and March 14, 1947, the seniority of the employee in his old job classification has been added to and made a part of his seniority in the new job classification.

All seniority accumulated in an obsolete classification, such as but not limited to Reamer, Heater, Sticker, Riveter, Countersinker, Bucker or Bolter, has been applied to the first currently used classification into which an employee was reclassified after leaving the obsolete classification. Future determination of the obsolescence of any classification presently contained in Appendix "A" of this Agreement, shall be by mutual agreement between the Company and the Union.

Section 14

A seniority register known as Appendix "D" to the collective bargaining agreement dated March 14, 1947,

between the parties has been agreed upon by the Company and the Union and is deemed to be final and correct as of January 1, 1949 and no appeal is permitted therefrom except those cases then pending arbitration. A revised seniority register, attached hereto and made a part hereof and marked Appendix "B", showing the seniority standing of each employee in each job classification shall be posted once each year in a place accessible to all employees and will be revised as of August 1 of each year. The first revision shall be as of August 1, 1949. An employee will have sixty (60) days from date his name appears on such revised roster to appeal his roster date or relative standing thereon; it being understood that such appeal may be made only on the standing as then posted and that the employee will not be permitted to appeal standings previously posted. In case an employee is off on leave of absence, vacation, sickness, disability or suspension at the time roster is posted, the time limit provided for herein will apply from the date the employee returns to duty. If no appeal is taken within the sixty (60) day period as provided, future appeals will not be entertained. A note will be placed on each roster stating the time limit of appeal. The Union shall be given copies of seniority roster when posted.

• • • • •

ARTICLE XIV

VACATIONS

Section 1

Effective December 31, 1966, vacations for eligible employees, as defined in Section 2, will be calculated as of December 31 each year. On the first December 31 of employment he will be given four (4) hours' vacation with pay at his base hourly rate at the time of taking the vacation for each month in which he worked ten (10) or more days between his hire date and December 31, up to a maximum of forty (40) hours. On the second December 31 of continuous employment he will be given one (1) week and two (2) days vacation of fifty-six (56) hours with pay at his base hourly

rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the third December 31 of continuous employment he will be given one (1) week and three (3) days vacation of sixty-four (64) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the fourth December 31 of continuous employment he will be given one (1) week and four (4) days vacation of seventy-two (72) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. At the fifth December 31 of continuous employment and through the ninth December 31 of continuous employment, he will be given a two (2) week vacation of eighty (80) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. At the tenth December 31 of continuous employment and through the nineteenth December 31 of continuous employment, he will be given three (3) weeks' vacation of one hundred twenty (120) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. At the twentieth December 31 of continuous employment and through the twenty-ninth December 31 of continuous employment, he will be given four (4) weeks' vacation of one hundred sixty (160) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. At the thirtieth and subsequent December 31sts of continuous employment he will be given five (5) weeks' vacation of two hundred (200) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. If an eligible employee is laid off prior to taking his earned vacation, the Company will pay the employee such earned vacation at the time of layoff, regardless of when the employee's vacation was scheduled and no further vacation right shall exist.

Section 2

In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31sts and has seniority on the current December 31st must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st. However, employees who are laid off during the year immediately preceding December 31st and because of such layoff do not qualify for a vacation under this Section will be given a pro-rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked twenty-five (25) weeks or more.

For purposes of eligibility for vacations, absence from work due to occupational injury or occupational disease up to twelve (12) months immediately following date of beginning of such absence will be included as time worked in the said immediately preceding twelve (12) months.

"Continuous employment" as used in this Article means continuous seniority since any break in such seniority caused by any of the reasons enumerated in Section 7 of Article X of the Agreement.

Section 3

Where an eligible employee has worked a six (6) day week for not less than thirteen (13) nor more than twenty-five (25) weeks during said twelve (12) months, he shall be granted an additional four (4) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

Where an eligible employee has worked a six (6) day week for twenty-six (26) or more weeks during said twelve (12) months, he shall be granted an additional eight (8) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

Eligible employees shall have the option of taking either full regular workdays with pay or be paid in cash for the additional vacation resulting from working the required six (6) day weeks. At the time of scheduling his regular vacation, the eligible employee will exercise his option by either scheduling the extra workdays off with pay or indicating he prefers cash in lieu of days off. The cash will be paid at the time he receives his vacation pay. Periods of less than a full day will be paid for in cash rather than time off.

Section 4

Any employee who has qualified for a vacation under Section 1 above may use all or part of his earned vacation to offset legitimate absences of three (3) days or more to the extent of his earned vacation. Legitimate absences shall mean an absence because of sickness of the employee or members of his family which requires his absenting himself from work or a death in the family.

Section 5

Nothing in this Article shall be construed as granting an employee more than one (1) vacation in any calendar year.

Section 6

Employees retiring prior to December 31 of the current year will be paid that portion of the vacation they would have earned as of December 31 of the current year had they not retired as the number of weeks in the current year in which they performed work bears to twenty-five (25). For example, if he performs work in two weeks he would receive 2/25ths of a vacation.

Section 7

If an employee dies prior to December 31 of the current year payment will be made as provided by law of that portion of the vacation he would have earned as of December 31 of the current year had he not died as the number of weeks in the current year in which he performed work bears to twenty-five (25). For example, if

he performs work in two weeks he would receive 2/25ths of a vacation.

• • • •

ARTICLE XXIV

GROUP INSURANCE PLAN

Section 1

Each eligible active employee will be entitled to participate in the Company's Group Insurance Plan to the extent provided in the Schedule of Benefits briefly set forth in Appendix "C" to this Agreement and more fully described in the Dravo Insurance Certificate which is incorporated herein by reference. This insurance program shall be placed with a reliable insurance firm and the cost of such insurance will be paid by the Company except for Supplemental Life Insurance which will be paid for by the employee. The employee will provide the Company with an authorization to deduct the cost of this insurance from his pay.

All employees are eligible to participate as of the first of the month following sixty (60) days after employment.

Section 2

This Article shall not be construed as requiring the continuation of any insurance benefit beyond the termination date of this Agreement.

This program is subject to amendments to conform with or to recognize benefits that are or may be provided by any State or Federal Law. In no event shall the benefits of this plan provide benefits duplicated under State or Federal Law, except to the extent that the benefits payable under this insurance program exceed the benefits payable under such laws.

• • • •

ARTICLE XXVI

PENSIONS AND RETIREMENT

The Company and the Union have reached mutual agreement on the subject of pensions and retirement and

the same is contained in a separate supplemental agreement dated September 27, 1950 and supplemented in October, 1965.

• • • •

IN WITNESS WHEREOF, Dravo Corporation (Engineering Works Division) has caused this Agreement to be signed by its duly authorized officers and its corporate seal to be affixed hereto; the Industrial Union of Marine and Shipbuilding Workers of America, A.F.L.-C.I.O., has caused this Agreement to be signed by its duly authorized officers and its seal affixed hereto; and Local 61 of the Industrial Union of Marine and Shipbuilding Workers of America, A.F.L.-C.I.O., has caused this Agreement to be signed by its duly authorized officers and its seal affixed hereto; all on the date first above written.

DRAVO CORPORATION

Engineering Works Division
Heavy Metals Plant

By: WALTER L. DAVIDSON
General Manager

Attest: WM. G. GREER
Industrial Relations Manager

G. W. ALEXANDER
Operations Manager

D. W. RAEGLER
Plant Manager

G. T. LEONARD
For Director of Industrial Relations

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, A.F.L.-C.I.O., Local No. 61

By: LEONARD A. THORNBURG
President

PHILIP J. HAUSHALTER
Chairman, Negotiating Committee

JOHN GOOD
ALBERT G. FUCHS
EDWARD J. MEYER
THOMAS R. PIPICH
WILLIAM R. FAULKNER
JOHN L. TAYLOR

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, A.F.L.-C.I.O.

By: C. A. LEONE

Attest: THOMAS R. PIPICH

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, A.F.L.-C.I.O.

By: JOHN J. GROGAN
President

Attest: ANDREW A. PETTIS
Vice-President

CERTIFICATE OF SERVICE

I, Sidney Salkin, one of the attorneys of record for plaintiff, hereby certify that I served a copy of this Interrogatories Propounded By Plaintiff To Be Answered BY A Responsible Officer Of Dravo Corporation, Engineering Works Division on defendant Dravo Corporation, on the — day of February 1972, by depositing in the United States mails true and correct copies of the aforementioned in an envelope requiring no postage and sent certified mail, return receipt requested, certified no. 673071 to Charles R. Volk, Esquire, 2900 Grant Building, Pittsburgh, Pennsylvania 15219, counsel of record for defendant.

/s/ Sidney Salkin
Sidney Salkin
Attorney
One of the attorneys for plaintiff

CERTIFICATE OF SERVICE

I, CHARLES R. VOLK, the attorney of record for defendant, hereby certify that I served a true and correct copy of the completed Interrogatories propounded by plaintiff to be answered by a responsible officer of Dravo Corporation, Engineering Works Division, on plaintiff on the 21st day of April, 1972, by depositing in the United States mail a true and correct copy of the aforementioned in an envelope sent by certified mail, return receipt requested, certified number 538509, to Sidney Salkin, Esquire, United States Department of Labor, Office of the Solicitor, 1505 Jefferson Building, 1015 Chestnut Street, Philadelphia, Pennsylvania 19107, one of the attorneys of record for plaintiff.

/s/ Charles R. Volk
Charles R. Volk
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

[Accepted July 2, 1972, 2:25 PM, U.S. Attorney's Office Pittsburgh, Pa.]

EARL R. FOSTER, PLAINTIFF

vs.

DRAVO CORPORATION, DEFENDANT

PROCEEDINGS

Non-Jury Trial in the above-entitled action, commencing at 10:00 A.M. on May 31, 1972, United States District Court, Pittsburgh, Pennsylvania, before Honorable Wallace S. Gourley.

APPEARANCES:

On behalf of the Plaintiff:

Sidney Salkin, Assistant U. S. Attorney

On behalf of the Defendant:

Robert H. Shoop, Jr., Esquire

Marilyn Brown
Court Reporter

[2] (The Court came to order.)

THE COURT: The Court at this time will proceed with the trial at Civil Action 71-781.
MR. SALKIN: Good morning, Your Honor.
THE COURT: Good morning. Be seated.
Proceed, Mr. Salkin.
MR. SALKIN: Thank you, sir.

If I may, at first I wish to read into the record certain of the defendant's answers to the plaintiff's interrogatories which have been filed of record in this case.

THE COURT: What is your case about?

MR. SALKIN: This case, sir, is a claim brought on behalf of a veteran, Earl Foster, who seeks vacation pay and damages from his employer, as one of the reemployment rights guaranteed veterans by Congress, within the purview of the Selective Service Act of 1967. That Act is found at 50 United States Code Appendix, Section 459(b) and (c).

These rights which are sought by the veteran here were wrongfully denied him by the defendant, his employer.

The issue to be considered by this Court, sir, may be framed as follows:

Is a contract requirement which establishes as a prerequisite to vacation time with pay, that the employees have received earnings a certain number of weeks, a denial of his [3] rights secured by the Act?

Now, if I may—

THE COURT: You could also add a phrase to that, when the rights were accumulated during military service.

MR. SALKIN: I'm sorry, sir. I missed that. Would Your Honor—

THE COURT: Shouldn't you also add to your question, when the rights were accumulated during military service?

MR. SALKIN: Automatically accrued him during his absence in the military service.

THE COURT: He did not work during this period.

MR. SALKIN: He did not work while he was absent in the military service. That is correct.

THE COURT: The question should be posed, when the rights were accumulated during military service, and he would have worked if he had not been in the military service.

MR. SALKIN: That is correct, sir, right.

THE COURT: Because there is a difference.

MR. SALKIN: Now, if I may proceed with my earlier request to read into the record certain answers of the defendant.

THE COURT: Anything that has been admitted by the defendant or anything that can be read to me, you may read it into the record, and no testimony need be offered.

[4] MR. SALKIN: Very good, sir.

I cite first Interrogatory No. 10, which read, "State the number of work weeks worked by the plaintiff, and for which he received earnings from the defendant in the course of his employment by the defendant for each calendar year from the period August 5th, 1965 through December 31st, 1968." The answer is, 1965, 22 weeks; 1966, 47 weeks; 1967, 9 weeks; 1968, 13 weeks.

THE COURT: Why are we interested or concerned with any years except the years 1967 and 1968? The defendant in his stipulation agreed that if this gentleman had not been in the military service, he would have worked during the total of the period of time that he was in the service.

So, what relevancy do the years 1965 and 1966 have to the determination of these issues?

MR. SALKIN: Actually, the years 1965 and 1966 have no relevance, from the plaintiff's standpoint, sir.

THE COURT: Why are you reading it into the record?

MR. SALKIN: Merely because it is part of the answer, part of which does have relevance; and rather than just read the Court a partial answer, I read the entire answer, sir.

THE COURT: Well, it might be better to just read in what relates to the determination of these issues. No Court is interested in something that has no relevancy.

[5] MR. SALKIN: Very good, sir.

THE COURT: You can always read part of an answer. You do not need to read the whole.

MR. SALKIN: All right. The Interrogatory No. 14 reads, "In the period from on or about March 3rd, 1967 to on or about October 7, 1968, had the plaintiff not been absent in the military service, would he have

worked and received earnings therefor in the employment of the defendant for at least 25 weeks in each of the calendar years 1967 and 1968?" The answer is yes.

Interrogatory No. 15—

THE COURT: That was also agreed to in the stipulation. Why are you reading interrogatories when you have a stipulation? I mean, what is your trial tactic in this? Wouldn't it be simple—

MR. SALKIN: I think that will become apparent when the defendant argues his case.

Fifteen reads, "If your answer to the preceding interrogatory is in the affirmative, would the plaintiff have accrued vacation benefits for each of the calendar years 1967 and 1968? If so, compute the specific amount of vacation benefits and the nature thereof for each of the calendar years 1967 and 1968."

THE COURT: I notice in the stipulation, you have a place that you left open, each of you. I asked that you [6] agree to everything that is humanly possible. I cannot understand why you could not agree when it comes to a point as to where it is set forth that if the plaintiff is entitled to benefits, the benefits shall be in the amount of blank. Why couldn't you agree on it?

MR. SALKIN: We did this morning, sir.

MR. SHOOP: Your Honor, we have. That isn't the—This is the correct stipulation. Mr. Salkin and I just met yesterday.

THE COURT: Sir, I can only read what you gave me. That is all you gave me.

MR. SHOOP: I know, Your Honor. I wonder why Mr. Salkin hasn't admitted the stipulation into evidence.

THE COURT: Sir, your simple way to try it is to read into the record your stipulation.

MR. SALKIN: I hadn't come to that yet, sir, but I am about to.

THE COURT: Well, you do not want to repeat these, now, do you?

MR. SALKIN: No, sir. But, you see—

THE COURT: Why read interrogatories and answers if you have it in your stipulation? That is what I cannot understand.

MR. SALKIN: Because they are not in quite the same form in the stipulation, sir.

[7] THE COURT: Well, I guess we all try cases differently.

MR. SALKIN: The answer to Interrogatory No. 15 was, 1967, 64 hours; 1968, 72 hours.

Now, at this point, sir, I offer into evidence a final stipulation of facts which has been agreed to—

THE COURT: Admitted. Admitted. I would rather accept that one part; just that one.

MR. SHOOP: Your Honor, that is not the stipulation that you have in your possession.

THE COURT: Why do you men confuse a Judge then—and I take these things home and study them at night—and give me things that are improper? Why do you do that?

MR. SHOOP: I didn't—

THE COURT: Why didn't you recall what you did?

MR. SHOOP: I didn't give it to you, Your Honor. The first opportunity Mr. Salkin and I had to meet was yesterday afternoon, and we agreed to a stipulation that is now being presented into evidence.

THE COURT: Well, then, take your stipulation. I do not want to look at it. It is improper. Why do you do these things to me? I spend hours in preparing cases, and then, when we get in trial, the attorney on one side or the other says to me, "Well, that's no good."

[8] MR. SALKIN: If Your Honor please, I had several conversations over the telephone with counsel in advance—

THE COURT: Couldn't you have called my Administrative Assistant and told him, "Forget what I sent you. It is not the right one."

MR. SALKIN: We did not complete the final stipulation until late yesterday afternoon, sir; and it was not presented in final form until this morning.

THE COURT: Well, read it into the record.

MR. SALKIN: Very good, sir.

THE COURT: I do not know what is in it.

MR. SALKIN: All right. "Stipulation of Fact, No. 1. Plaintiff was initially employed by the defendant on or

about August 5th, 1965, and he remained continuously employed until he was granted a military leave of absence by the defendant and left his employment on or about March 6, 1967, for induction into the Armed Forces of the United States."

THE COURT: Just a minute. It is all right to tear this up, so we do not get confused? Get it out of existence. I do not want it. All right with you?

MR. SALKIN: It's all right with me, sir.

THE COURT: Well, it is of no value to anyone.

MR. SALKIN: Not at this point. "2. At—

[9] THE COURT: You fellows, you must think the only thing I have to try is what you have. Go ahead.

MR. SALKIN: "2. At the time plaintiff left his employment as aforesaid, he was employed as a Scaler—Hand Brush at an hourly rate of $2.62.

"3. The aforementioned employment was in an other-than-temporary position.

"4. Plaintiff served in the Armed Forces until October 1st, 1968, and thereafter made timely application to defendant for reinstatement in his employment and was restored in his pre-service position by defendant on or about October 7, 1968, at an hourly rate of $2.92.

"5. At all times material hereto, plaintiff's plant seniority was and is August 5th, 1965.

"6. By the terms of a collective bargaining agreement then in force between plaintiff's collective bargaining representative, Industrial Union of Marine and Shipbuilding Workers of America, Local Union No. 61, AFL-CIO, and defendant, vacation benefits and eligibility therefor are provided in Article 14, Sections 1 and 2. A copy of said provisions of the said collective bargaining agreement are attached hereto and marked Exhibit 1. Said collective bargaining agreement and the aforementioned provisions thereof were in effect according to their respective terms at all times relevant to the present case.

[10] "7. In addition, Article 10, Section 8 of the aforesaid agreement provides that, 'An employee who is granted a leave of absence shall retain and accumulate seniority for the period of the leave of absence.'

"8. Article 14 defines seniority as 'the right of preference in layoffs or rehiring, measured by length of service

in a job classification at the Heavy Metals Plant,' and Section 2, lines 5 to 8 of said agreement provides, 'Continuous employment as used in this Article means continuous seniority since any break in such seniority caused by any of the reasons enumerated in Section 7 of Article 10 of the agreement.'

"Article 14, Section 1 of the agreement provides that on the first December 31st of his employment, an employee receives 4 hours paid vacation for each month in which he worked 10 days or more. The second December 31st of continuous employment, he receives 1 week and 2 days of paid vacation. Progressively longer paid vacations are awarded up to the 30th year, always based on years of continuous employment after December 31st.

"Article 14, Section 2 provides that, beginning with the second December 31st of employment and thereafter, in order to qualify for vacation, an employee must have 'received earnings' in 25 work weeks in the 12 months immediately preceding the current December 31st.

[11] "Article 14, Section 2, lines 23 through 29 further provides, 'Employees who are laid off during the year immediately preceding December 31st, and because of such layoff do not qualify for a vacation under this section, will be given the pro rata vacation to which they might otherwise be entitled, on the relationship of the weeks they did work to 25 weeks.

"9. Plaintiff received all vacation benefits due him for the year 1966 before entering military service on or about March 6, 1967. In the period from on or about March 3rd, 1967 to on or about October, 1968, the plaintiff would not have been laid off.

"10. During the period between on or about March 6th, 1967 and October 7th, 1968, while the plaintiff was absent in the military service, approximately 12 employees who were junior to the plaintiff in terms of plant seniority date, and who were not called for induction into the military service, received earnings in at least 25 work weeks in each of the calendar years 1967 and 1968, and were thereby eligible for vacation benefits. Said junior employees, the number of work weeks worked, and the

vacation credits received are hereto attachd as Stipulation Exhibit No. 2.

"11. Plaintiff's vacation benefits would have amounted to 64 hours for the calendar year 1967, and 72 hours for the calendar year 1968, based on his seniority and length of continuous service with the defendant.

[12] "12. Article 5 of the aforesaid agreement recognizes the company's right to discharge or discipline employees for 'proper cause'."

THE COURT: What does that have to do with the case?

MR. SALKIN: As far as I'm concerned, nothing, sir. In the event the Court—

THE COURT: Well, then, why are you stipulating that?

MR. SHOOP: Your Honor, I just wanted to stipulate that, if Mr. Salkin is prepared to make the argument that a person need only work 26 days in the course of a whole year to qualify for vacation. I would like to point out to the Court that if a man is continuously absent, we would discharge that man for failure to be a regular employee.

So therefore, we do have proper cause in that this analysis or analogy that Mr. Salkin may make in his argument—and I don't know if he is going to make it—that a man would only work 26 days and could get a full vacation isn't really true, because it won't happen, would be my point on that.

THE COURT: What do you mean, it would not happen?

MR. SHOOP: Because we would discharge an [13] individual for proper cause, that is, failure to be a regular employee, if he just came to work one day for each of 26 weeks, or 25 weeks, excuse me.

MR. SALKIN: Of course, that's purely speculative from the plaintiff's point of view.

MR. SHOOP: Of course, it's speculative from your point of view; and I just wanted to point out that, of course, there are other remedies, if Mr. Salkin wants to make this argument.

THE COURT: I do not see where it has anything to do with the case, but if you want it in the record, all right. At least, I will not consider it, unless you change my thinking.

MR. SALKIN: Very good, sir.

"In the event the Court finds for the plaintiff in this case, it is stipulated and agreed that the damages incurred and payable to plaintiff by defendant by virtue of defendant's denial of plaintiff's vacation pay and other benefits shall be $377.92."

Now, if I may, sir, I will offer the aforementioned stipulation of facts with its exhibits attached for identification, and ask that it be admitted into evidence.

THE COURT: Admitted. Mark it, Mr. Clerk.

But do not offer any oral testimony about anything that has been stipulated.

[14] MR. SALKIN: I have no intention of doing so, sir.

THE COURT: Did you attach the collective bargaining agreement to your stipulation?

MR. SALKIN: The relevant portions which I quoted, sir, are attached.

THE COURT: Read me the provision in the collective bargaining agreement, if you will, please, that holds that when a man is in the military service—I realize he keeps getting his seniority. Read me the provision of the collective bargaining agreement that says that while he is in the military service, it is the same as if he were working, as far as vacation allowance is concerned.

MR. SALKIN: There are no provisions in the collective bargaining agreement, sir, providing for any benefits with relation to persons in the military service, other than a simple statement that the—if I may find it here now.

THE COURT: Well, there is no man who has any more sympathy to any man who has the guts and the physical and mental capabilities of serving his country, when they hearken to the call of service, than I do.

It is just unfortunate that so many of the young men come home, especially from this dastardly war we have in Vietnam, and they have no work or no place to go.

[15] But where does the Court get any authority to read into a collective bargaining agreement something that does not exist?

That is my problem in these cases; and this is not the first one of this nature that I have had, as you are well aware.

MR. SALKIN: Very much so, sir.

There are several distinctions. Number one, the Court gets the authority from the holdings of the Supreme Court in several cases.

THE COURT: The Supreme Court cannot read into a collective bargaining agreement something that does not exist.

MR. SALKIN: But the Supreme Court has held that collective bargaining agreements, where they collide with the provisions and rights guaranteed to the veteran by the terms of the Selective Service Act, must give way to the requirements of the Act.

THE COURT: Well, that I cannot buy.

MR. SALKIN: But that is the language of the Court, sir.

THE COURT: Well, I have ruled to the contrary.

MR. SALKIN: Pardon me?

THE COURT: I have ruled to the contrary. [16] as you know.

MR. SALKIN: I know. I know, sir.

Now, going back to your first question about the right—

THE COURT: You had better present your case on facts first. When you tell me you are through with the evidence, then I will hear the other side.

Is there any other evidence you have to offer?

MR. SALKIN: Simply the answer to your question as to the rights of the veteran, in the collective bargaining agreement itself.

Section 10 provides that an employee inducted into the Armed Forces of the United States shall be given the minimum re-employment rights guaranteed him under the Selective Service Act, as amended; and that is the only reference in the collective bargaining agreement at any point.

THE COURT: Well, they gave this young man his job back, with the increase in salary rights, as soon as he was discharged and he was able to arrange his affairs to start to work, didn't they?

MR. SALKIN: That is not in issue here, sir.

THE COURT: Isn't that a fact?

MR. SALKIN: That is a fact, I presume. That is not in issue.

THE COURT: It either is or it isn't.

[17] What your adversary said is that a person in the military service will not lose any seniority rights. That I agree, and that should be. But didn't he get everything back that he had before he left, as far as the job that he had and the wages that he received for that job?

MR. SALKIN: He got his wages and he got his job back, sir, but not all of his seniority rights.

THE COURT: Pardon me?

MR. SALKIN: But not all of his seniority rights. From the plaintiff's point of view, his vacation benefits—

THE COURT: Yes, but he had—

MR. SALKIN: —were part of his seniority rights.

THE COURT: Sir, you and I had a little trouble the last time you were here, with you interrupting me.

Please don't interrupt me, and I won't interrupt you, either.

As I understand it, he got his job back, with the same seniority stature as if he had worked during the whole time he was in military service, when he came back; is that right?

MR. SALKIN: Except that he—

THE COURT: He got the job back, based on his seniority. He did not lose anything as far as his job [18] status.

MR. SALKIN: He got his pre-service job back.

THE COURT: That is all I asked you. And he got the increase in wages that took place during the time that he was in military service.

MR. SALKIN: He got his increase in wages. Yes, sir.

THE COURT: That is all I asked you again. The only thing he did not get was, the company would not pay him the accumulation of vacation time that he would

have accumulated had he been working, rather than if he had been in the military service.

MR. SALKIN: That is correct.

THE COURT: You claim that while under this contract—Well, you say under the contract there is no provision in it about him getting the accumulation as far as vacation for the time that he was in military service. There is nothing in the contract about that?

MR. SALKIN: There is no—nothing in the contract about that, in those terms.

THE COURT: That is all I asked.

MR. SALKIN: In those terms.

THE COURT: That is all I asked.

MR. SALKIN: And if I may make an amendment—

THE COURT: That is all I asked.

[19] MR. SALKIN: If—May I make an amendment to my answer?

THE COURT: Is there anything in the contract that says that while any employee of the defendant is in the military service of his country, he earns, he earns his vacation rights the same as if he were actually working while he was in military service? Is there anything in the contract that says that, in the collective bargaining agreement?

MR. SALKIN: The contract does say that, by merely being on the payroll, as opposed to working, an employee does earn vacation benefits.

THE COURT: Read that to me.

MR. SALKIN: Very good, sir.

THE COURT: That while he is on the payroll—

MR. SALKIN: The payroll.

THE COURT: —he earns his vacation benefits, even though he does not work.

MR. SALKIN: That is correct.

THE COURT: What does that say? The section and the page.

MR. SALKIN: All right. Section 1 of Article 14.

THE COURT: Section 1.

MR. SALKIN: Article 14 reads as follows:

"Effective December 31st, 1966, vacations for [20] eligible employees, as defined in Section 2—

THE COURT: What does Section 2 say? How does that define it? As defined in Section 2?

MR. SALKIN: "In order to qualify for the foregoing vacations, an employee who has been continuously employed for two or more December 31st's and has seniority on the current December 31st, must have received earnings in at least 25 work weeks in the 12 months preceding the current December 31st."

THE COURT: All right. Now, did this gentleman receive earnings in those preceding 25 months while he was in military service?

MR. SALKIN: He received earnings in the years in question, nine weeks in 1967 before entering military service, and 13 weeks in 1968 after leaving.

THE COURT: But that says 25 weeks, doesn't it?

MR. SALKIN: That does.

THE COURT: Well, how does he qualify under that section if it says 25 weeks, and he only worked the nine and 13 weeks?

MR. SALKIN: Because this case is very similar to the *Accardi vs. Pennsylvania Railroad* case.

THE COURT: Forget about the other case. I am asking you a simple question. You are saying there that [21] for the man to be eligible for vacation benefits, he must work at least 25 weeks in a year; right?

MR. SALKIN: It says he must work—he must have received earnings. It does not say he must work.

THE COURT: But he must have received earnings in 25 weeks in a year.

MR. SALKIN: That is correct.

THE COURT: Now, did he work during the years 1967 and 1968 and receive earnings for 25 weeks?

MR. SALKIN: He did not receive earnings for 25 weeks in each of those calendar years.

THE COURT: For the year 1967, he only received earnings for nine weeks.

MR. SALKIN: That is correct.

THE COURT: And through the year 1968, he received earnings for how many weeks?

MR. SALKIN: Thirteen.

THE COURT: Well, then, how can you say that he comes within the provisions of that contract?

MR. SALKIN: Because of the interpretation of the *Accardi* case by the Supreme Court, sir.

THE COURT: But I am not talking about that. I am talking about that contract.

MR. SALKIN: The contract—

THE COURT: You will admit that, as far as [22] the contract is concerned, and as far as what he did, he only worked nine weeks in the years 1967 and he only worked 13 weeks in the year 1968.

MR. SALKIN: That is correct.

THE COURT: So as far as the contract is concerned, he does not fall within the terms and provisions of it.

MR. SALKIN: That is correct, sir.

THE COURT: I asked you.

MR. SALKIN: That's it. Very good.

Now, may I—Do you want to hear my argument, sir?

THE COURT: I want to know if you are through with your case.

MR. SALKIN: All right, sir. Now, I wish to enter into evidence—

THE COURT: I am giving you a chance to present your case. We will have the arguments after all the evidence is in.

(Whereupon, a document was marked Plaintiff's Exhibit No. 2 for identification.)

MR. SALKIN: At this point, sir, I wish to enter into evidence, having first had it marked for identification, a photostatic copy of the plaintiff's discharge certificate—

[23] THE COURT: Admitted.

MR. SALKIN: —indicating an honorable release from active duty.

THE COURT: Admitted.

(Whereupon, Plaintiff's Exhibit No. 2 was received in evidence.)

MR. SALKIN: It will be Plaintiff's B, I believe.

THE CLERK: Two.

MR. SALKIN: Two? I have no further evidence as such, to offer at this stage.

THE COURT: Defendant may proceed.

MR. SHOOP: I have no evidence, Your Honor.

THE COURT: Defendant may proceed with your argument.

Have you men submitted to the Court your suggested findings of fact and conclusions of law? Or are you in agreement as to all the facts?

MR. SHOOP: As to all the facts, Your Honor, I believe we are in agreement.

THE COURT: You are in agreement. Well, you know the Court is bound to make findings of fact and conclusions of law. So, since there is no dispute between you, then the findings of fact of this Court would be what is in your stipulation.

[24] MR. SHOOP: I would agree, Your Honor.

THE COURT: Is that agreeable?

MR. SALKIN: Yes, sir.

THE COURT: Now, do you have anything in your stipulation to the effect that, consistent with several of the questions that I have asked, that as far as the collective bargaining agreement is concerned, it is not in dispute that in the year 1967, this plaintiff only worked nine weeks, and in the year 1968, only 13 weeks? That is in your stipulation?

MR. SHOOP: I believe so, Your Honor.

THE COURT: Is it in your stipulation that there is no provision in the collective bargaining agreement that sets forth or provides that while a person is in military service, he does not—and when he is not actually working for the defendant—he is not considered as being actually at work?

MR. SHOOP: There is no affirmative statement of that in the stipulation, but I would believe that Mr. Salkin and I could stipulate that that is the case under the collective bargaining agreement.

THE COURT: Well, he has told me that, and I am asking if you agree.

MR. SHOOP: I agree.

MR. SALKIN: I don't agree with that, Your [25] Honor.

THE COURT: Pardon?

MR. SALKIN: I can't agree to that, Your Honor.

THE COURT: You just did it twice, about five minutes ago.

MR. SALKIN: I agreed that he has to be on the payroll and have received earnings, but I did not—I cannot agree that he must have worked, or that he would have worked.

THE COURT: You don't listen, my friend. I said, there is no provision in the collective bargaining agreement that says, in so many words, that while a person is in military service, he is considered as actually working and earning wages from his employer.

MR. SALKIN: No. That is correct.

THE COURT: That is all I asked you, for the third time.

Do you agree?

MR. SHOOP: I agree, Your Honor.

THE COURT: All right.

MR. SHOOP: I have prepared a brief, a pretrial memorandum of law.

MR. SALKIN: I would ask the Court for leave to file a brief on behalf of the plaintiff.

[26] THE COURT: This case was supposed to be ready for final adjudication. What do you want me to delay it again for? You mean you have not filed every brief that you want to file?

MR. SALKIN: No, sir. I haven't filed a brief as yet. I can have one in a few days.

THE COURT: I apparently did not specify and set it out the way I intended. Let's see what I say.

I do not like to delay these things. If I have a matter for determination, I like to decide it as soon as I leave the Bench. Sometimes I do it right from the Bench.

You say I never told you to file a brief in this case?

MR. SALKIN: That is correct, sir.

THE COURT: Well, I made a mistake.

You have no other brief you want to file, except what you have given to the Court today?

MR. SHOOP: That is right, Your Honor.

THE COURT: I commend you, sir, for having the brief ready during the trial. All counsel should do that, without the Judge writing it on a blackboard.

Please do it in the future.

MR. SALKIN: Very good, sir.

THE COURT: Because the easiest, the best, and the most proper time for a Judge to decide a case that is [27] not involved, like this one, is as soon as he hears it, while it is fresh in his mind.

Go ahead, sir.

MR. SHOOP: If Your Honor will just excuse me a second.

THE COURT: You can have all the time you want.

MR. SHOOP: Your Honor, I would submit to the Court that this case is identical to the one that was decided by this Court in the case of *Fees* vs. *Bethlehem Steel*. I have cited it in my pretrial memorandum.

THE COURT: Here is the opinion; I wrote it.

MR. SHOOP: I am sure this Court is quite aware of it. As a matter of fact, I spent some time when I prepared my pretrial memorandum, if I just wouldn't take the *Fees* case and take your opinion and write it down as a pretrial memorandum and submit it back to the Court, because I think—

THE COURT: Of course, I could be wrong.

MR. SHOOP: I think Your Honor covered all of the points that Mr. Salkin has raised here today and will raise, particularly those of the *Accardi* and the *Eagar* case.

I believe that this Court, in *Fees*, did distinguish *Eagar* from the instant case and from this case before the Court.

[28] As you recognized, the Supreme Court's decision in *Eagar* does not unequivocally lend support to the Government's position here.

I would submit that in *Eagar*, the plaintiff had earned his vacation and was automatically entitled to the benefits under the provisions of that contract.

As Your Honor has recognized, in this case there is a provision that a man must have earnings in 25 weeks in order to qualify to be an eligible employee for vacation. In this case, the plaintiff did not earn the requisite 25 weeks' earnings. He earned nine in 1967 and 13 in 1968.

I would submit that it is still the law of the Third Circuit, as this Court again recognized, of *Dougherty* vs. *General Motors*, and in that case, our Third Circuit recognized that it is not a violation of the veteran's re-employment rights to have a work requirement requiring that a person work so many years or have so much earnings to qualify for a vacation.

This is the law of our Third Circuit; and until changed by the Third Circuit or unequivocally changed by the Supreme Court of the United States, I submit that this is still the law.

So, therefore, Your Honor, based on your decision in *Fees*, based on the Third Circuit's case in *Dougherty*, I would submit that this case falls squarely within those rules, that an earnings requirement as set forth in the [29] collective bargaining agreement is not a violation of a returning veteran's rights.

In my pretrial memorandum, I have submitted other cases that would all hold and support this Court's determination, including the Tenth Circuit—the Tenth and the Fifth Circuit Court of Appeals.

I would submit that if an employee is to be entitled to more, his union representative and collective bargaining representative would have negotiated such benefits for that man. But in this contract, an employee is entitled to the minimum benefits required for a returning veteran.

I am sympathetic, as is this Court, towards the plight of returning veterans. But in this case, the plaintiff got his job back at an increased rate of pay; he got additional vacation over and above that that he had when he left; and he got on that escalator. All things that were automatically accrued to him because of seniority, he received.

Through no stretch of the imagination, under this collective bargaining agreement, does vacation automatically accrue to a person, unless he has worked the requisite 25 weeks or had earnings in these requisite 25 weeks.

THE COURT: Well, how do you distinguish this case from the case that your distinguished adversary, Attorney Salkin, persist has application? The Supreme Court of the United States has ruled, as I understand his position, [30] that when a man is in military service, it is the equivalent of working.

MR. SHOOP: I don't believe that is what that case—any case of the Supreme Court made the statement that when a man is in the military service, it is the equivalent of working. The *Accardi* case was not concerned with vacation pay. It was concerned with severance pay.

In our case, it is not even working. We are one step beyond that. A man must have earnings in 25 weeks to qualify for a vacation. He must have earnings. He must do more than work. He must have earnings.

Maybe this is a distinction without a difference, but I would submit that it is more of a requirement than just working, to have earnings in each of 25 weeks; and I submit that *Accardi* does not make the statement that Mr. Salkin would submit. I am—

THE COURT: I could not find it in a very careful reading of the case, but he again is persisting that it does provide it in substance.

Well, we will no doubt be enlightened on this some day by somebody.

MR. SHOOP: Well, I would submit, Your Honor, that this Court in *Fees* and our Third Circuit Court in *Dougherty* has correctly found the law in regard to returning veterans; and to open the door further, as counsel for the [31] Government would suggest, is to open the door to possibility of payments for the insurance during the course of a man's service, Blue Cross, hospitalization, anything else that he may be entitled to, that has commonly been recognized as earnings under collective bargaining agreements; and, as Your Honor is fully aware, under labor policy, you earn your vaca-

tion. You earn these benefits. They do not automatically accrue, as the plaintiff would have us believe.

I thank you.

THE COURT: You may proceed, Mr. Salkin.

You say something about a brief, sir. You discuss all facts in your pretrial statement, and I do not know, unless you have something that you are going to place in a brief different from what you presented to Court in the *Fees* case, what is the use of your rewriting it?

MR. SALKIN: My pretrial statement is not a complete argument, sir.

THE COURT: Well, you have put in all the facts about your case. You do not need to repeat what is in your pretrial statement.

MR. SALKIN: But I would like to argue the law, sir.

THE COURT: I do not think I ever denied you the right to argue the law. Your time is unlimited.

MR. SALKIN: That isn't what I mean, sir. [32] That is the purpose of my filing a brief.

THE COURT: You mean you want to argue today, and you want to file a brief, and argue again?

MR. SALKIN: No, sir. I want to argue today, and simply follow up with a brief. That is all.

Let me first disabuse the Court of any notion that I am advancing the theory that absence in the military service is the equivalent of working. That is not what I said the *Accardi* case held; and in fact, I do not see that the *Accardi* case does so hold, and that is not the theory that I advanced before this Court today.

What I am simply suggesting to the Court is that under the particular and peculiar circumstances of this case, in any event, that vacation benefits as applied here are a perquisite of seniority: that these are benefits which would have automatically accrued to the plaintiff by his mere attachment to the work force, by his continuity of employment, of his being on the payroll and accruing seniority.

THE COURT: If he had worked 25 weeks in the year.

MR. SALKIN: I cannot go along with that as a qualification, sir.

THE COURT: That is where we separate and go off in different ways; and as I see it, it is going to require an Appellate Court to tell us who is right, whether [33] it is you or I.

MR. SALKIN: Yes, it may be so. However—

THE COURT: We will know this time next year. Go ahead.

There is no difference between this case and the *Fees* case.

MR. SALKIN: There are some very distinguishing differences, I think, sir. In any event, whichever way the *Fees* case—

THE COURT: I wish you would spell them out. I fail to see them.

MR. SALKIN: Okay. To begin with—

THE COURT: There is a difference in the number of weeks that this young man worked during the year 1967 and 1968, and there is a difference in his work and a difference in his wages. Certainly there are differences, but I mean the basic, fundamental, legal issue is the same, isn't it?

MR. SALKIN: The fundamental, legal issues is the same.

THE COURT: That is all I asked.

MR. SALKIN: There are distinguishing factors, though, in those cases.

THE COURT: Spell them out for me.

MR. SALKIN: All right. Number one, in the [34] *Fees* case, as I recall, there was a work requirement that the veteran or plaintiff have worked for a specific number of hours in order to qualify for vacation benefits, commensurate with his seniority.

THE COURT: All right, you have hours in the *Fees* case, and you have weeks in this case.

MR. SALKIN: Received earnings in a minimum of 25 work weeks.

THE COURT: And in this case, it is wages for 25 weeks.

MR. SALKIN: That is correct.
THE COURT: What is the difference?
MR. SALKIN: There is a difference—
THE COURT: To me, it is the same thing.
MR. SALKIN: The difference is the same—
THE COURT: I do not care whether it is earnings or wages.

MR. SALKIN: The difference is the same difference that the *Accardi* case applied in the matter of severance pay, where they determined that the real nature of the benefits there was commensurate with seniority, because of the fact that it had as its incentive, not added pay for services performed, but a reward for continuous employment, a reward for continued attachment to the work force.

This is precisely the situation here.

[35] THE COURT: My goodness, my friend, if employers have to pay—I wish they could afford to do it financially. If employers have to pay every young man who is unfortunate enough to be called to serve his country, what you say, they will go backrupt. They cannot stay in business, because they are paying out money and they get nothing in return for it.

MR. SALKIN: Sir, I submit to the Court that, even if that were true or it should be true, that is a matter for legislative consideration; and the statute as it presently reads and as applied by the Supreme Court, I submit to the Court, is otherwise.

THE COURT: But Congress can pass no law that impairs the obligation of a contract. If you have a collective bargaining agreement between an employer and the union, and a gentleman, a member of the union, Congress cannot pass a law that impairs the obligation of that contract or changes it.

Congress, by the Selective Service Act, cannot read something into a collective bargaining agreement that does not exist, and no Court can.

MR. SALKIN: I submit that the Supreme Court—If that is the terms on which this Court views it, then I submit that the Supreme Court did just that.

THE COURT: I think maybe, with the new [36] complement of the Supreme Court, if they rule that way, they might change the rules.

MR. SALKIN: Well, they have done it in a number of cases, sir.

First of all, they established the escalator principle, as I have cited before in the past, in the case of *Fishgold vs. Oliver Dry Dock*, and they followed up with the *Accardi* case, establishing the principle which I have just cited; and of course, the *Fishgold* case has been reaffirmed in many other cases since that time.

I submit also that the Ninth Circuit Court, in the *Eagar* vs. *Magma Copper* case, in its decision at that time, although it did come out at the time the *Accardi* case came out, did not—was not aware of the *Accardi* decision, as evidenced by the fact that in a recent case, the majority of the Court in the Ninth Circuit has now adopted the former dissenting view of Judge Madden; and that case is found at—is entitled *Locaynia* vs. *American Airlines*. That is dated March 17, 1972, not yet officially reported, but it may be found in 67 Labor Cases, Paragraph 12,537. What the Court said there was as follows:

"The narrow issue presented in this: Was this vacation pay a perquisite of seniority, as appellants claim, or was it within the category of other benefits, as American contends? Resolution of the issue turns on the appropriate [37] interpretation of *Accardi* vs. *Pennsylvania Railroad* and *Eagar* vs. *Magma Copper Co.*," citing his own decision.

They went on to state, after citing the Supreme Court's holding defining seniority, and the escalator principle, they discussed the per curiam reversal of this Court's decision in the *Magma Copper Co.*

THE COURT: Which Court?

MR. SALKIN: This Ninth Circuit Court, and then said, "We read the Supreme Court summary reversal of *Eagar* as an explicit rejection of American's contention." That is, that vacation pay is another benefit, rather than

a seniority perquisite, and therefore reversed the judgment of the lower Court and found for the plaintiffs.

Now, I wish the Court would recognize—

THE COURT: Well, all *Accardi* involved, my friend, was the question of severance pay allowance for World War II veterans who were being phased out by the railroad.

The Court held the railroad was required to compute the time spent by the employees in the military in determining severance allowance, which was based on years of compensated service, as defined in the collective bargaining agreement as one day worked per month for a minimum of seven months out of the year.

In so holding, the Court felt a liberal construction of the term seniority was necessary, and that the [38] intention of Congress, as expressed in the Act, was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their duties.

The Court, in *Accardi*, was concerned with insuring that veterans would be properly credited with years of seniority; and severance payments in *Accardi* were based primarily on length of service. It had to do with what these men were to get as far as their severance allowance pay. It did not have anything to do with vacation.

MR. SALKIN: No, but every Court that has since discussed the *Accardi* case has applied the principle of the *Accardi* case to vacation benefits; and I can cite—

THE COURT: I have never read one that holds that.

MR. SALKIN: Well, I think—

THE COURT: Well, which one holds that, under the facts that you have in this case, this gentleman is entitled to be considered as having worked 25 weeks in the years 1967 and 1968?

MR. SALKIN: *Morton* vs. *Gulf Railroad*, Gulf, Louisiana.

THE COURT: What is the citation? Give me all the facts of that case.

[39] MR. SALKIN: Let's see if I have—I may have the entire opinion here, sir.

THE COURT: Don't you know what is in your cases? You should know what you are standing on. You argue that a certain case has certain provisions and certain value. Otherwise, I could hear this under Rule 78. I do not need to hear your argument.

You wanted to be heard, so you certainly should tell me what is in your cases that you say supports your position. Do you tell me you do not know?

MR. SALKIN: I have—yes, sir. I have the—

THE COURT: What is the citation?

MR. SALKIN: You said you wanted the facts of the case?

THE COURT: I want the citation, and I want the facts.

MR. SALKIN: The citation is 405 Fed. 2nd 415.

THE COURT: What Circuit?

MR. SALKIN: This is the—

MR. SHOOP: Eighth Circuit.

MR. SALKIN: Eighth Circuit, sir.

THE COURT: All right. What are the facts in this case?

MR. SALKIN: The appellant, Robert Morton, [40] began working as an electrician for the Gulf, Mobile & Ohio Railroad Company in 1950 and continued in his employment until April 6, 1951, when he left his position to serve in the United States Air Force for a period of four years. On April the 18th, 1955, five days after his honorable discharge from the Air Force, Morton resumed and has since continued his employment.

In May of 1967, Morton instituted this action against his employer for recovery of earned vacation pay and for a decree directing the railroad to credit him with the time spent in the military in calculating the length of his paid vacation.

Morton contends that the railroad has denied him seniority rights, contrary to Section 9 of the Universal Military Training and Service Act.

Federal jurisdiction having been established, the District Court denied him—

THE COURT: Denied him seniority rights. That has not been denied in this case.

MR. SALKIN: We allege that it has, sir; that vacation pay benefits are seniority rights.

THE COURT: It depends how the Court is phrasing that, and using that phrase, that denied him seniority rights. Do you mean they use that, by failing to pay him his vacation, they denied him seniority rights?

MR. SALKIN: That is, by failing to—No—[41] to award him paid vacation, yes, sir.

Rights and obligations of the employer and the employees are granted paid vacations, the length of bargaining agreements. These agreements specified that employees are granted paid vaactions, the length of which is determined for each employee according to the number of consecutive years in which he has performed a minimum number of days of compensated service for the railroad.

THE COURT: They are seniority rights; right?

MR. SALKIN: I presume so, yes.

THE COURT: You cannot presume so. It either is or it isn't.

MR. SALKIN: Well, it is.

THE COURT: All right.

MR. SALKIN: The railroad considered that Morton must have insufficient compensated service in each year following his 1955 re-employment to qualify him under the then effective collective bargaining agreement for ten days of paid vacation in both 1966 and 1967, which is the normal vacation for employees with ten consecutive years of active service with the railroad.

In seeking additional vacation benefits, Morton contends that, for the purpose of determining his vacation benefits, the time spent in military service should have been [42] considered as equivalent to compensated employment with the railroad.

With such calculations, Morton had achieved 15 years of continuous service with the railroad by the beginning of 1966, and accordingly, he asserted entitlement to 15 days of vacation pay in the year 1966 and in the year 1967.

THE COURT: Your collective bargaining agreement differs. This one says that a man has to actually work, work 25 weeks in the year, to be eligible.

MR. SALKIN: But that does not say so, sir.

THE COURT: This collective bargaining agreement does.

MR. SALKIN: No, sir. It says that he must have received earnings. It does not say he must have worked.

THE COURT: What is the difference?

MR. SALKIN: For 25 weeks.

THE COURT: If you receive earnings or work? If you do not get paid, you do not receive earnings unless you work.

MR. SALKIN: In theory, sir, he could receive earnings in 25 consecutive work weeks by working one or two days a week.

THE COURT: If this country is coming to that, what is going to happen? Industry is going to close its [43] doors. There won't be any jobs for anybody.

Go ahead. I just cannot see your philosophy, my friend, but you go ahead. Maybe you will change me.

There are enough give-away programs in this country, without making industry pay a man when he does not work.

MR. SALKIN: Now, the Court now goes on to cite Section 9(c) of the Universal Military Training and Service Act, and reads, "Shall be considered as having been on furlough or leave of absence during his period of training and service in the Armed Forces, shall be so restored without loss of seniority," and that is italicized.

THE COURT: We all agree to that.

MR. SALKIN: "And shall be entitled to participate in insurance and other benefits offered."

THE COURT: I agree to that.

MR. SALKIN: All right. The appellee railroad, in denying Morton's claim to an increased vacation entitlement, contends that vacation pay is not an element of Section 9 seniority, but rather should be considered as one of the other benefits, for the purposes of that section. It is urged that if another employee similarly situated to Morton had been on leave of absence from the

railroad, rather than in military service, for the same four years, he would not have performed compensated service, as defined by the [44] collective bargaining agreement, and would not have been entitled to more than ten days of vacation pay in 1966 and in 1967.

The issue here, however, is whether the vacation pay is a seniority right under the statute. If so, Morton's service time counts. If not, Morton is to be treated as any other employee who had been on non-military leave. Morton's right to increase vacation benefits is a necessary perquisite of his Section 9 seniority right.

We hold that the railroad's failure in calculating vacation pay to credit Morton with compensated service time for the period in which he was in the Armed Forces violated Section 9(c) of the Act.

Without this inclusion, Morton would not be accorded reinstatement in his employment without loss of seniority, as is required by the Act. *Eagar* vs. *Magma Copper Co.*, 389 U.S. 323 (1967), and *Accardi* vs. *Pennsylvania Railroad Co.*, 383 U.S. 225 (1966).

So here, we have the Circuit—

THE COURT: And that collective bargaining agreement had the same provisions in it as the collective bargaining agreement has in this case?

MR. SALKIN: All it defined was compensated service. Compensated service—

THE COURT: Sir, you answer my question. [45] Does the collective bargaining agreement in the case that you have have the same phraseology in it as the collective bargaining agreement has in the case before the Court? Or is it different, and if so, how is it different?

MR. SALKIN: It is different in the following. The collective bargaining agreement in Morton read as follows:

"Effective with the calendar year 1965, an annual vacation of 15 consecutive work days with pay will be granted to each employee covered by this agreement who renders compensated service on not less than 100 days during the preceding calendar year, and who has 15 or more years of continuous service, and who, during

such period of continuous service, renders compensated service on not less than 100 days, 133 days in the years 1950 to 1959, inclusive, 151 days in 1949, and 160 days in each of such years prior to 1949, in each of 15 of such years, not necessarily consecutive."

THE COURT: And the collective bargaining agreement before the Court is 25 weeks a year of compensated service.

MR. SALKIN: Of—All right, of having received earnings. You might—It sounds as if it were for compensated—

THE COURT: And you believe the phrase, "having received earnings", to be synonymous, or mean exactly the same thing as having received—You are saying that the [46] phrase, "having received earnings", and "compensated service" mean exactly the same thing.

MR. SALKIN: As a matter of fact, I think it is even more liberal than compensated service, because the word service implies work, whereas received earnings does not necessarily imply work.

THE COURT: Well, nobody is going to pay somebody earnings if he does not work, unless they want to go out of business.

MR. SALKIN: However, this was the agreement in the *Morton* case, which I just read to you, sir. This is cited in a footnote in the decision.

THE COURT: What is that Circuit again?

MR. SALKIN: That we be Eighth Circuit, I believe.

THE COURT: Who are the Judges? I know them all.

MR. SALKIN: Who are the Judges? Vogel, Lay and Bright.

Now, would you like me to continue with that?

THE COURT: Sir, how you want to argue this case is up to you. I just asked you some questions that I had.

MR. SALKIN: All right. We are benefited by those teachings of the Supreme Court in similar [47] controversies. In *Accardi* vs. *Pennsylvania Railroad Co.*, supra, an employer granted, pursuant to a union agreement, separation allowances to employees whose services were terminated by the employer. The allowances increased in

proportion to the length of time an employee had rendered compensated service.

The Supreme Court held that the employer was required to include the period of military service of reemployed veterans in computing the amount of their severance pay. Such separation allowances were included within the seniority rights guaranteed by the Act.

Similarly, in *Eagar* vs. *Magma*, supra, a collective bargaining agreement provided for paid vacations at the end of a work year to any employee who had been employed for at least one year and had worked 75 per cent of the shifts available to him that year. The agreement also stipulated for holiday pay to those employees who worked the shifts immediately preceding and immediately subsequent to the holiday, and who had been on the payroll for three consecutive months prior to the holiday.

Employee Eagar began working for the company on March 12, 1958, and entered military service one week before the one-year anniversary date of his employment. Following his military discharge, he returned to company employment on May 2nd, 1962.

Although Eagar had worked 75 per cent of the [48] shifts for the year ending March 12, 1959, and had worked the shifts both before and after Memorial Day and Independence Day in 1962, Magma refused him vacation benefits and holiday pay for those periods because, one, as to vacation pay, he was not in the service of the company at the end of the vacation earning year, as was required by the contract; and two, as to holiday pay, he had not been on the compay payroll for three consecutive months prior to either holiday. The Ninth Circuit sustained the employer's position at 380 Fed. 2nd 318 (1966).

THE COURT: How do you distinguish the *Dougherty* vs. *General Motors* case in this Circuit, which holds that vacation eligibility is a benefit to which a veteran is not entitled if he has not fulfilled a work requirement for eligibility?

MR. SALKIN: That depends, sir, on the nature of the work—

THE COURT: And our Circuit has ruled since 1949, and certiorari was denied, and they have never changed that rule of law.

MR. SALKIN: I submit, sir, that that depends pretty much on the nature of the so-called work requirement.

THE COURT: But didn't our Circuit rule that way?

MR. SALKIN: Yes, sir.

THE COURT: And isn't it the duty of a [49] District Court to follow the rule of law as enunciated by the Circuit in which the District Court sits?

MR. SALKIN: That is true.

THE COURT: So, whether I agree or whether I disagree with the United States Court of Appeals for the Third Circuit in *Dougherty* vs. *General Motors*, I have no discretion I can apply. It does not matter if all the other nine Circuits plus the District of Columbia have rule to the contrary. I still must, I shall, and am required to follow the decision in this Circuit. I have no discretion I can exercise.

MR. SALKIN: I submit, sir, that you do. I submit—

THE COURT: I cannot, sir.

MR. SALKIN: I submit that, under the rulings of the Supreme Court—

THE COURT: But the Supreme Court has not ruled the way you are arguing.

MR. SALKIN: Well, it's the plaintiff's allegation that it has, sir. We hold—We allege that the Supreme Court—

THE COURT: You can well be right, my friend.

MR. SALKIN: Pardon me?

THE COURT: You can well be right in your position, but you are going to have to convince my higher [50] Appellate Court. I cannot disregard what they say.

MR. SALKIN: I submit, sir—

THE COURT: Even though the other nine Circuits plus the District of Columbia ruled differently, I cannot say, "Well, what you said, my dear brothers, does not seem to be accepted any more, so I am not going to follow you."

It is not easy, it is not pleasant for a United States District Judge to have the Appellate Court who super-

vises his decision say to it, the District Court, "Where do you get the authority to say that what we have done is not right?"

I have read and I have re-read the *Dougherty* case, 176 Fed. 2nd 561, and it says unequivocally and without exception or reservation that vacation eligibility is a benefit to which a veteran is not entitled, if he has not fulfilled a work requirement for eligibility.

That is what it says. You claim they do not say that?

MR. SALKIN: No, sir.

THE COURT: If so, I will get the case and we will read it word by word.

MR. SALKIN: No, sir, I don't say that. I say, however, that in the—

THE COURT: Well, where does a District Court get authority to overrule a Circuit Court?

[51] MR. SALKIN: May I be heard on that question, sir?

THE COURT: Well, I have asked you a question.

MR. SALKIN: Very good. The Third Circuit in the *Dougherty* case emphasized that the veteran had received all vacation allowances which had accrued and to which he was entitled, up to the time of his entry into the Armed Forces.

THE COURT: This gentleman did, too, in this case, didn't he?

MR. SALKIN: He did, for the year 1966. He did not, for the year—

THE COURT: Up until the time he entered military service, he did.

MR. SALKIN: No, sir. No, sir. He received those vacation benefits which he had accrued in 1966. He received no vacation benefits for his work in 1967.

THE COURT: Well, he had not worked enough. He had only worked seven weeks.

MR. SALKIN: I submit that is precisely the point in the Gulf—*Morton* case, that I just—

THE COURT: Aren't you going to have to convince the Appellate Court? Not me. I have no authority to overrule the United States Court of Appeals for the Third Circuit.

[52] MR. SALKIN: The Third Circuit also ruled in *McLaughlin* vs. *Union Switch & Signal*, in which it distinguished its own decision in the *Dougherty* case, and in *Mentzel* vs. *Diamond*, as follows:

> In the *McLaughlin* case, the Court said that was true that a reason for inclusion of vacation provisions in any employment, that is to say, employment contracts, is to afford the opportunity of rest and relaxation. Such provisions, however, performed a second function as well—

THE COURT: Did they overrule the *Dougherty* case?

MR. SALKIN: They distinguished it, sir, without overruling it.

THE COURT: Did they overrule it?

MR. SALKIN: No, sir. They did not overrule it. They distinguished it.

We quoted and adopted the statement of the United States Court of Appeals for the Second Circuit in *In re Public Ledger*, 161 Fed. 2nd 762. In the—

THE COURT: It does not matter what the other ten Circuits have said.

MR. SALKIN: I'm talking about the Third Circuit now, sir. I am now reading you a quotation from a decision of the Third Circuit in *McLaughlin* vs. *Union Switch & Signal*.

[53] THE COURT: What is the citation?

MR. SALKIN: 166 Fed. 2nd 46.

THE COURT: Yes, but that was six, or four or five—166 Fed. 2nd what?

MR. SALKIN: 46.

THE COURT: *Dougherty* was 176 Fed. 2nd 561. This is about four or five years before, the case you are citing.

MR. SALKIN: So was *Mentzel* vs. *Diamond*, as 167 Fed. 2nd 299. However, the Third Circuit carried its reasoning in that case by reviewing the construction afforded the Act in the *Fishgold* and *Trailmobile* cases, and there they said—

THE COURT: Mr. Clerk, you had better go out there and get me 176 Fed. 2nd 561, please.

MR. SALKIN: There the Court said, "The application here is simple. The veteran is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the plant."

THE COURT: I can see where you have an excellent argument before the United States Court of Appeals for the Third Circuit, gentlemen; and you have said this, "A research of all the law indicates that the ruling should be to the contrary. We are asking, sirs, gentlemen, that you respectfully reverse your decision in that case."

[54] It is not pleasant for a District Judge to decide a case and to have the Circuit come down with an opinion, "This Court is at a loss to understand why the District Court has not followed the rule of law enunciated by this Circuit."

We do not like to have those opinions come down against us.

MR. SALKIN: I submit, sir, that the Third Circuit would, under the construction of the cases in *Accardi*, under—

THE COURT: They might, but it is not my prerogative to say so. It is theirs.

I have sat with the Appellate Judges quite a bit. I know how they think and reason. When a District Judge tries to take the ball from them, they do not like it.

MR. SALKIN: May I point out to this Court the very real distinction between *McLaughlin* and this case. I mean to say, the *Dougherty* and this case.

Number one, in this case, this veteran acquired no vacation benefits for the years 1967 and 1968. That means he cannot begin to accrue vacation benefits until 1969, which he would enjoy the following year, 1970. In effect, he is being penalized for his military service by having to wait three calendar years before he can begin to enjoy vacation benefits that should have accrued to him as a matter of [55] seniority.

In the *Dougherty* case, which was then before the Third Circuit, he had received all that he could have received at the time he entered the military service, which is not the case here; and the Court was not there dealing

with the issue, since it was not then in contention, as to what vacation benefits he would be entitled to.

THE COURT: Well, all this *Dougherty* case is, and the only distinction there is a 1946 contract between the union and the employer which based vacation benefits on his 1945 gross earnings of the employee. Now, the only difference there, instead of the benefits being based on the 1945 gross earnings of the employees, and the case before the Court, it is based on his earnings during 25 weeks of each year.

MR. SALKIN: But this distinction—

THE COURT: Well, that is what your contract says.

MR. SALKIN: No, sir. It does not so say. There it is based on—

THE COURT: Oh, my goodness. What does it say?

MR. SALKIN: Sir, the distinction there—

THE COURT: What does it say, when a person is entitled to vacation benefits?

MR. SALKIN: It says he must have received [56] earnings, without express—

THE COURT: For 25 weeks.

MR. SALKIN: Yes, but there is no—

THE COURT: That's all I asked.

This case says that he must have had—It was based on his 1945 gross earnings. They hold that the veteran is not entitled to vacation pay for 1946, although he was otherwise eligible. He returned in 1946, but he did not get gross earnings then.

It was not illegal under the Selective Service Act, since the contract did not place the veteran in the position inferior to that of non-veterans on leave of absence.

They hold that what you are arguing here is not right.

MR. SALKIN: I don't see it that way.

THE COURT: I am very frank, sir. I am not going to overrule the United States Court of Appeals for the Third Circuit in *Dougherty* vs. *General Motors Corp.*, 176 Fed. 2nd 561, which I hold applies to this case; and you are going to have to get the United States Court of Appeals for the Third Circuit to say that is no longer the law in this Circuit. I am not going to say it, sir.

MR. SALKIN: I think the obvious distinction there, sir, is that the—

THE COURT: There is no distinction.

[57] MR. SALKIN: I see a distinction, sir. May I point it out? May I point out the distinction?

There, the vacation benefits are based on a formula determined on the dollar earnings that the veteran had. In this—

THE COURT: It is the same thing here. It is based on his earnings during 25 weeks.

MR. SALKIN: An undefined amount of earnings, sir.

THE COURT: So, what is the difference?

MR. SALKIN: If he earned one dollar for 25 weeks, or $25.00, he is entitled to vacation.

THE COURT: Now, you are talking silly.

MR. SALKIN: In theory.

THE COURT: You are talking silly.

MR. SALKIN: But it could be any amount.

THE COURT: You have to be practical.

MR. SALKIN: It could be any amount. There is no particular amount on which a formula is derived.

THE COURT: I have tried to be so courteous and understanding to you, but you will not take no for an answer. So I am going to keep quiet. You go ahead and talk as long as you want.

MR. SALKIN: In the case of *Kelly* vs. *Chicago, Rock Island & Pacific Railroad Co.*, 293 Fed. [58] Supplement 423, decided on May 21st, 1968 by the District Court for the Western District of Oklahoma, the plaintiff there was an employee whose employment rights and other benefits were subject to the appropriate provisions of certain collective bargaining agreements, which were stipulated and attached to the stipulation of facts.

The defendant took the position that the plaintiff was not entitled to relief because the agreement allows annual vacation with pay only to employees who render compensated service on not less than 120 days during the preceding calendar year.

This contention of defendant seems to be in keeping with the collective bargaining agreements, and was undoubtedly a sound and valid position at the time it was taken in 1967. However, the recent decision of the Supreme Court in *Eagar* vs. *Magma Copper Co.* completely resolved the question adversely to the defendant.

I believe that *Magma* compels a holding that the plaintiff is entitled to the relief sought by it.

The defendant asserts that the per curiam reversal of the Ninth Circuit in *Magma* leaves some doubt about the question. A careful reading of the reversed Circuit Court decision, together with a reading of the dissenting opinion written by Mr. Justice Douglas and concurred in by Mr. Justice Harlan and Mr. Justice Stewart, convinces me that the high [59] Court held that a plaintiff similarly situated was entit'ed to vacation time notwithstanding the fact that he rendered no compensated service during the antecedent period.

THE COURT: Isn't this a matter for the collective bargaining agreement? Can't the union sit down with the employer and say, "Now, we want this in the collective bargaining agreement."

Because, as I am reading the Circuit—I said I was not going to interrupt you again, but I cannot help interrupting you.

It says the contract had no provision in it about this, and we are being asked—The Court says, "We are being asked to carve an exception for them, although we have no reason to believe that the bargaining agents of either the union or General Motors involved contemplated any additional restriction or favor for paying veterans for their vacation benefits."

Certainly you can sit down at the bargaining table and provide for this.

MR. SALKIN: Of course, sir. But if it were as simple as that, I submit that Congress would not have enacted the statute to begin with.

Now, this line of cases was also considered in the case of *Messina* vs. *Consolidated Freightways Corp. of Delaware*, 315 Fed. Supp. 340. This was a Western District of [60] New York case decided on February 10th, 1970.

THE COURT: I might say also that as I continue reading this case you cited, *McLaughlin* vs. *Union Switch & Signal*, 166 Fed. 2nd 46, they say, "The circumstances of the case before us [*Dougherty*] are quite substantially different from those found in *McLaughlin*."

They paid no attention to *McLaughlin*. They disregarded it in *Dougherty*.

MR. SALKIN: What page, sir?

THE COURT: The top of page 562.

MR. SALKIN: That's true, because the facts were different.

THE COURT: Why are you citing it to me when you know? If you would have read the case, you would know they say, "We are not following *McLaughlin*."

MR. SALKIN: They have distinguished it, because the facts were different, sir.

THE COURT: Go ahead.

MR. SALKIN: This dichotomy between vacation benefits as a seniority right and vacation benefits as other benefits was considered in a number of cases after the *Accardi* decision.

Saleck vs. *Great Northern Railroad*, at 277 Fed. Supp. 936, held that the length of time an employee was in military service is to be considered in a determination of the [61] length of vacation to which he is entitled, when determining the years of compensated service; and, in contrast to *Dougherty*, the *Morton* vs. *Gulf, Mobile & Ohio Railroad* case which I cited held that the failure to work a certain number of days in the year, which barred the plaintiffs from being entitled to a vacation time in the following year, relied on the theory that since an employee on leave of absence would not be entitled to vacation because he did not work the required number of days in the previous year, the veteran should not be entitled to such a benefit. It seemed valid, except when one considers a year to contain approximately 250 work days. A contract requirement such as faced by Messina, that he work 150 days in the contract year before he is entitled to vacation, could work a hardship on those entering military service since, if they left in the early part of June and returned in the latter part

of July, on a calendar year basis, they would not be entitled to vacation either for their service prior or subsequent to their military service.

THE COURT: Tell me this: This veteran and all veterans who work for this company are not placed in any inferior position to that of a non-veteran who does not work, are they?

MR. SALKIN: A non-veteran—

THE COURT: Suppose an employee had worked for this company, and for reasons of—well, 101 reasons—[62] he could not work. He does not earn and become entitled to his vacation allowances during the time he does not work, does he?

MR. SALKIN: If you are referring--

THE COURT: Does he?

MR. SALKIN: In some degree, he does. He is in an inferior position.

THE COURT: In other words, any man who has worked for this company, who does not work 25 weeks during a year, regardless of why he is off work, he still earns his right to vacation pay allowance, even though he does not work?

MR. SALKIN: Now, you have qualified that, sir, that question, with regardless of why he doesn't work. Because there is a difference.

THE COURT: Suppose he is sick. Suppose he has illness in his family. Suppose his health is such that he has to leave this area and go away for six months out of the year. Do you mean, if a man does not work, he is entitled to the accumulation of the time that he is away, toward the credit for his vacation allowance? Is that right?

MR. SALKIN: He is entitled to a pro rata vacation, under the terms of this agreement.

THE COURT: That is what this case holds. They said, "We cannot, we cannot and we shall not draw any difference between a veteran and any other employee who is [63] away from his work." They say this; and it is not placing these veterans in any position inferior to that of a non-veteran on a leave of absence.

Suppose a non-veteran wants a leave of absence, he wants to go to Europe. He does not get any credit while he is in Europe.

Suppose a non-veteran wants to go to the Virgin Islands because he has emphysema or he has a heart condition. He does not get any credit while he is in the Virgin Islands toward his vacation. He is on leave of absence.

MR. SALKIN: However, he does get a pro rata vacation.

THE COURT: If he has worked 25 weeks in the year before he went away, yes.

MR. SALKIN: No, sir, that is not what the agreement says here.

THE COURT: A veteran is not entitled to a better position than anybody else.

MR. SALKIN: That is true. He is not entitled to a better position, but he is entitled to the same position as if he had been there.

THE COURT: All right. Your distinguished associate wants to talk to you. You had better go talk to him. He has been trying to get your attention. Your distinguished associate wants to talk to you.

[64] MR. SALKIN: I know.

THE COURT: I will hear him, if he wants to be heard.

MR. SALKIN: What I was trying to point out to the Court—

THE COURT: If he is a member of the Bar of some Court, I will.

MR. SALKIN: What I was attempting to point out to the Court is contained in Section 2 of Article 14.

THE COURT: Of what?

MR. SALKIN: Of the collective bargaining agreement in this case.

THE COURT: What does it say?

MR. SALKIN: Beginning with line 20 on page 54—

MR. SHOOP: You have got the wrong agreement.

MR. SALKIN: Well, it's the same.

MR. SHOOP: You are reading lines, and it is not right.

MR. SALKIN: All right. It is in Section 2 of Article 14, and reads:

"For purposes of eligibility for vacation, absence from work due to occupational injury or occupational diseases up to 12 months immediately following the date of beginning of such absence will be included as time worked [65] in that immediately preceding 12 months."

THE COURT: Well, occupational diseases or injury of an employee, I can understand that. The difference is, he got hurt there.

Suppose he was in an automobile accident. Do you mean to say that if he had only worked 23 weeks and he unfortunately was in an automobile accident and was in a hospital for six and a half months, that while he was in the hospital recuperating, he would not get any credit toward his vacation benefits?

MR. SALKIN: I submit, also Section 2 further provides, "However, employees who are laid off or are absent because of non-occupational sickness or injury during the year immediately preceding December 31st, and because of such layoff or absence due to non-occupational sickness or injury do not qualify for a vacation under this section, will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to 25 weeks; but in no case more vacation than they would have received under the section if they had worked 25 weeks or more."

THE COURT: Do you contend that this employer and the union, when they negotiated this collective bargaining agreement, intended to place veterans in a position inferior to that of non-veterans?

MR. SALKIN: No, sir, I do not. I am merely [66] pointing out this section because of the questions asked by the Court.

THE COURT: My friend, you can be right. But this is not the Court that you have to convince.

If the United States Court of Appeals for the Third Circuit says, "We are rescinding this opinion, we are no longer following it in the Circuit," why, that is it.

MR. SALKIN: In that case, sir, I have nothing further to say.

THE COURT: Well, I do not know anything further I can say to you.

MR. SHOOP: Your Honor, may I make just two comments?

THE COURT: Sir, I gave this whole day to you men, and such other period of time as you want. I am not limiting you.

MR. SHOOP: I would just like to point out to the Court some fallacies—

THE COURT: You can well have a problem when you get down to the United States Court of Appeals for the Third Circuit, if I decide this in your favor. They will say, "Yes—Although two of the Judges are still on the Court, although they are Senior United States Judges; but the fact they are Senior United States Judges does not make any difference. They have as much authority as an active Judge. [67] You had Judge Biggs, Judge McConnell and Judge Kolodner. Judge Biggs and Judge Kolodner sit regularly in the Third Circuit. Judge McConnell has gone to the great beyond.

MR. SHOOP: Your Honor, *Accardi* and the *Eagar* case submitted only that matters which automatically accrue to a veteran were the rights that he had when he returned. This was recognized by this Court in *Fees* and also by the Third Circuit.

Here, a veteran has to earn his vacation by working 25—by having earnings in 25 weeks in the course of the year.

In *Eagar*, as pointed out by Mr. Salkin, Mr. Eagar had worked the requisite 75 per cent of the shifts.

THE COURT: What about the equities of this? Don't you think the employer might have some duty to give him a pro rata share vacation?

MR. SHOOP: No, sir, Your Honor.

THE COURT: Maybe you should.

MR. SHOOP: I would—

THE COURT: I say maybe you should. He worked so many weeks in the year 1967; he served his country; he worked so many weeks in 1968. He did not work the required number, but why don't you get fair?

MR. SHOOP: Your Honor, this is a matter for a collective bargaining agreement, as Your Honor has [68] pointed out repeatedly during the course of this hearing.

THE COURT: Well, many litigants have differences; they resolve them. Maybe it might not be well to have this in the books against you.

MR. SHOOP: I would think, Your Honor, that—

THE COURT: Many times, I represented a lot of corporations and unions when I was practicing law. I would pay money and settle cases to keep it out of the lawbooks. I did not want to face it.

Here is a man who worked so many weeks in the year 1967. He worked so many weeks in the year 1968. He earned something toward his vacation, didn't he?

MR. SHOOP: Yes, Your Honor, but he did not have the requisite requirements to be eligible for vacation. There are specific instances—

THE COURT: All I am suggesting to you, sir, sometimes it does not pay to be technical.

MR. SHOOP: Yes, sir, Your Honor. I can appreciate the Court's comments, but, as I say, under the collective bargaining agreement—

THE COURT: Do you want to settle this case?

MR. FOSTER: No, sir.

THE COURT: Well, forget what I said. You are not practical and realistic either.

[69] MR. SHOOP: Your Honor, that isn't the issue before this Court, the pro rata share—

THE COURT: I know it isn't.

MR. SHOOP: Fine. I just wanted to point it out.

Also, the *Morton* case, as cited by Mr. Salkin, is not on point. The *Morton* case—

THE COURT: Experience has taught me, in 27 years as a Judge, that litigants won't even take a compromise. They want to go all the way. They do not want to go back to their boss, or their superior, or their employer and say, "Well, the Judge suggested that we compromise this, and maybe we had better do it."

MR. SALKIN: May I suggest—

THE COURT: They want the whole hog, or none. I have seen the Government of the United States lose millions of dollars, millions, by not following my suggestion to compromise a case.

MR. SALKIN: Sir, we were at this very point yesterday; and at that time, it was the defendant who refused to settle this case, sir.

THE COURT: I do not care whether it was the defendant—

MR. SALKIN: I just want the Court to be aware of that.

[70] MR. SHOOP: But the Court has asked today if the Government is ready to settle, and you indicated no; and that isn't the issue before this Court, Mr. Salkin. Now, if you want to—

THE COURT: I know it is not the issue before this Court.

MR. SHOOP: That's right. I would just like to make two points.

THE COURT: The greatest asset and liability that a corporation has today is personal public relations. I would say your personnel director of the corporation and your labor negotiator are the two most important men in any corporation, except finances. They will make or break a corporation.

MR. SHOOP: I am inclined to agree, sir.

THE COURT: Wouldn't it build up your stature and position among men and all these veterans to say, "Well, we realize under our contract we are not required to do this, but here, you worked nine weeks in 1967 and you worked 13 weeks in 1968. Our contract says we do not have to pay you unless you earned money for 25 weeks, but we are going to compromise. You served your country. We are appreciative of it."

You could build up the greatest public relations with your men that you could ever do. But companies won't do [71] this; and generally unions will not do it; and so many, many times, the United States of America will not do it.

MR. SALKIN: I would like to advise the Court that, on the very precise basis which the Court has

suggested this morning as a basis for settlement, we were prepared and had been authorized to settle this case yesterday afternoon.

THE COURT: You are dealing with a measly—How much money?

MR. SALKIN: Three hundred ninety some dollars.

THE COURT: Three hundred ninety some dollars. Each of you, each of you are going to pay a thousand to two thousand dollars, because one of you is going to appeal this thing. But what are you going to gain out of it?

MR. SHOOP: Well, Your Honor, I would submit—

THE COURT: I do not care what you do. I am just suggesting the propriety of maybe being practical and realistic.

MR. SHOOP: Well, Your Honor, the Government has indicated that they would not consider settling, so this—

MR. SALKIN: We have no proposal, sir, from the other side, with which to consider a settlement.

THE COURT: Well, the only proposal we had [72] to start on, and that is the pro rata share, based on the number of weeks he worked during the years 1967 and 1968. There is nothing more that you have to start on.

MR. SALKIN: That's right, but that proposal has not been made.

MR. SHOOP: Your Honor, I would submit that under the provisions of the collective bargaining agreement, the company has no authority to do this.

THE COURT: The company has no authority?

MR. SHOOP: The provisions of the collective bargaining agreement provide for no such payment as Your Honor would suggest.

THE COURT: I know that.

MR. SHOOP: And the company would have to discuss this matter under Federal law of labor relations with the union.

THE COURT: With the stature of your law firm, if the company does not do what you suggest, they had better get another law firm. You do not need to go to them for advice.

But I see it every month in this Court. The greatest problem you have today is heads of labor unions will not be practical and realistic, and personnel managers, and those who negotiate for the company will not be realistic.

I had The Pittsburgh Press in here yesterday [73 & 74] for five or six hours. They are the most unrealistic, impractical, arbitrary persons I have ever dealt with in my life.

Corporations and heads of labor are the same way. You should hear some of the labor relations cases we get in this Court.

If I were President of a corporation, my most expensive man would be the Director of Labor Relations. He is the most valuable man in the corporation. There is no more valuable. If the President gets $50,000, he should get $150,000.

All right, you are not interested in settling. Do you have any other further arguments?

MR. SHOOP: No, Your Honor.

THE COURT: Do you have any further arguments?

MR. SALKIN: No, sir.

THE COURT: How long do you want, sir, to present your brief?

MR. SALKIN: I was just wondering if I might have a transcript of the notes of testimony?

THE COURT: I will direct that this record be transcribed at the joint expense of the parties, with a copy to be filed for the use of this Court and any Appellate Court.

[75] You people, believe me, are going to spend two to five thousand dollars on this case each, win, lose, or draw. The record will cost you two or three hundred dollars apiece. I will follow up with a written order, Miss Reporter.

MR. SALKIN: May I have until the filing of the transcript, sir, to file my brief?

THE COURT: Why do you want the transcript to file your brief? You know you are going to delay this case two to three months. How much time do you want after the transcript.

She only has about ten ahead of yours. How much time do you want after the transcript is filed?

MR. SALKIN: I don't wish to delay this Court.

THE COURT: Sir, you are not delaying me. I try to get things decided as soon as I can. The best time for me to decide is to go right in and start dictating. That is the easiest for me. I know this. All I need to do is pick up three or four books, and I will have an opinion out in an hour.

But you want to file a brief, and I never deny a lawyer the right to file a brief; and I read every case the lawyer cites to me.

MR. SALKIN: I would like to have thirty days from today, sir, regardless of whether the transcript—

[76] THE COURT: You draw an order, Mr. Administrative Assistant, providing in substance that counsel for plaintiff will file their brief with the Court on or before the 3rd day of July, 1972.

MR. SHOOP: Your Honor, may I have ten days to file a reply brief?

THE COURT: That makes the case another month old. You will have to July 17th to file a counter brief.

MR. SHOOP: And I will notify the Court promptly if I don't want to. I would just like to see Mr. Salkin's brief.

THE COURT: You have heard everything he is going to say. Why are you spending thousands of dollars on a measly $390.00? You can settle this case for $150.00. It is nothing but a Squire's case.

How corporations can justify the expenditure of substantial amounts of money, just to have the pride and satisfaction in their own mind of saying, "I gave them an awful fight."

Were you in Vietnam?

MR. FOSTER: No, sir.

THE COURT: Where were you?

MR. FOSTER: The Mediterranean.

THE COURT: Is there anything else?

[77] MR. SALKIN: That is all. Thank you.

MR. SHOOP: Thank you, Your Honor.

MR. SALKIN: Thank you, sir.

THE COURT: If I were you, I would go back and I would ask the President of the company to have lunch with me today. If I were you, with whoever negotiates the collective bargaining agreement; and I would say, "I think a Judge can get this settled for $150.00 for me. Let's pay it and get rid of it."

MR. SHOOP: The Government hadn't indicated that they—

THE COURT: Will you take $150.00?

MR. SALKIN: If that is what it comes to.

THE COURT: Do you get picaynuish for peanuts. Forget about it.

MR. SALKIN: Wait a minute. The veteran says he would accept $150.00.

MR. SHOOP: Whatever the pro rata share—

THE COURT: Wait a minute. Why are you walking away so indifferently? Don't you have any executive with any authority?

MR. SHOOP: No, sir, Your Honor.

THE COURT: No one?

MR. SHOOP: No, sir.

THE COURT: You watch. You are going to [78] spend—You fellows get three, four or five hundred dollars a day; if you are not, you are underpaid.

MR. SHOOP: I don't. No, Your Honor.

THE COURT: I know what lawyers get.

How can you justify spending two or three thousand dollars, if you can settle a case for $150.00? How in the world can you justify it?

How can the Government of the United States justify it?

I know some of the members of Congress. I would write to them and say, "Here is a case I can settle for $150.00." You are going to spend a thousand or two thousand on this case.

MR. SHOOP: Well, Your Honor, I would submit that it isn't only this case. There are many veterans within the corporation who, in the corporation's interest, should be treated the same.

THE COURT: When does your collective bargaining agreement expire?

MR. SHOOP: Two and a half years from now.

THE COURT: Can't you renegotiate it?

MR. SHOOP: In the three-year period.

THE COURT: I would like to be President of your corporation for a while.

[79] MR. SHOOP: So would I, on occasion, Your Honor. But there is more than this case at stake.

THE COURT: There is more money wasted by corporations and unions in little disputes that do not amount to a darn. I had a strike not too long ago because they did not get the right toilet paper.

MR. SHOOP: Your Honor, I represented the company in that case.

THE COURT: It was the silliest thing I ever heard. You don't have the proper drinking water. You don't use the right gasoline in the trucks. They stall once in a while, and the driver has to get out.

I could write a history, and everybody would start laughing.

MR. SHOOP: But it is all true.

THE COURT: They would say, "Do you mean to say these things happen in a Court Room?"

I have a case now that you cannot say an invocation and a benediction at a graduation service.

All right, that is all.

MR. SHOOP: Thank you, Your Honor.

THE COURT: Defendants make a gross mistake in not doing what I suggest and compromise for $150.00. It is one of the biggest mistakes I have ever had before me in my [79a] tenure as a Judge. Maybe you are not going to win this case, too.

(Whereupon, the Court recessed at 11:40 A.M.)

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and complete transcript of the Non-Jury Trial held in the aforementioned action on May 31, 1972, before Honorable Wallace S. Gourley, Senior Judge.

/s/ Marilyn Brown
Marilyn Brown
Court Reporter

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-781

[Received Nov. 22, 1972, 10:30 AM, U.S. Attorney's Office, Pittsburgh, Pa.]

EARL R. FOSTER, PLAINTIFF

v.

DRAVO CORPORATION, DEFENDANT

PROTECTIVE NOTICE OF APPEAL

Notice is hereby given that Earl R. Foster, plaintiff, the above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action on the 6th day of November, 1972.

Date—Nov. 21, 1972

/s/ _____
Richard L. Thornburgh
United States Attorney

/s/ _____
Blair A. Griffith
Assistant US Attorney

OF COUNSEL

/s/ _____
Richard F. Schubert
Solicitor of Labor

/s/ _____
Louis Weiner
Regional Solicitor

/s/ _____
Sidney Salkin
Attorney
UNITED STATES DEPARTMENT OF LABOR

SUPREME COURT OF THE UNITED STATES

No. 73-1773

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

ORDER ALLOWING CERTIORARI—Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 562954 63

JUN 28 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

73-1773

EARL R. FOSTER, Petitioner,

v.

DRAVO CORPORATION

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES R. VOLK,
ROBERT H. SHOOP, JR.,
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for
DRAVO CORPORATION

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222

Financial Press Corporation, Pittsburgh (412) 391 2063

INDEX

	Page
Citations	ii
Counterstatement of the Questions Presented	2
Counterstatement of the Case	3
Reasons for Denying the Writ	6
Conclusion	9

CITATIONS

CASES

	Page
Accardi v. Pennsylvania Railroad Co., 383 U. S. 225 (1966)	7
Aeronautical Lodge 727 v. Campbell 337 U. S. 521 (1949)	4
Blair v. Oesterlein Co., 275 U. S. 220 (1927)	8
Dunn v. United States, 284 U. S. 390 (1932)	8
Eagar v. Magma Copper Co., 389 U. S. 323 (1967)	7
Ewert v. Wrought Washer Mfg. Co., 477 F.2d 128 (7th Cir. 1973)	4
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946)	6
Kasmeier v. Chicago, Rock Island and Pacific R. R. Co., 437 F.2d 151 (10th Cir. 1971)	4
Locaynia v. American Airlines, Inc., 457 F.2d 1253 (9th Cir.), Cert. den., 409 U.S. 982 (1972)	4
McGrath v. Manufacturers Trust Co., 338 U. S. 241 (1949)	8

STATUTE

Military Selective Service Act of 1967, 62 Stat. 614, as amended: 50 U.S.C. App §459	3, 6

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1773

EARL R. FOSTER, Petitioner

v.

DRAVO CORPORATION

Thorp, Reed & Armstrong, on behalf of Dravo Corporation, files this Brief in opposition to the Petition of the Solicitor General for Certiorari in the within matter.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether an employee, solely by reason of his military service, is entitled to accrue and automatically receive vacation pay without having met the valid earnings requirement set forth in the Collective Bargaining Agreement. (Answered in the negative by the Third Circuit Court of Appeals).

2. Whether an employee who received all vacation benefits due him at the time of his induction into the military service is entitled to a pro rata vacation solely by reason of his military service.

(Remanded by the Third Circuit Court of Appeals to the District Court for a determination if the issue was properly raised and litigated in that Court).

COUNTER-STATEMENT OF THE CASE

Petitioner Earl R. Foster was initially employed by Dravo Corporation (Dravo) on August 5, 1965, and worked for Dravo until he was inducted into the Armed Services of the United States on March 6, 1967. When Petitioner left Dravo he was awarded all vacation benefits which were then owed to him. Foster served in the military until October 1, 1968, and was restored to his previous position by Dravo on October 7, 1968. Upon his return to work, he was given credit for his military term in computing the length of his vacation benefits.

After his reinstatement, Foster requested that Dravo grant him vacation pay for 1967 and 1968. Article XIV, Section 2, of the Collective Bargaining Agreement, provides in the pertinent part that an employee to be eligible for vacation benefits "must have received earnings in at least twenty-five (25) work-weeks in the twelve (12) months immediately preceding the current December 31st." Nowhere in the Collective Bargaining Agreement is it stated that while a person is in the military or on leave of absence, is he considered to be earning wages from Dravo.

Since Foster had worked for Dravo for only nine weeks in 1967 and for only thirteen weeks in 1968, Dravo refused Petitioner's request for vacation pay. Dravo's refusal was based on the aforementioned provision of the Collective Bargaining Agreement that since Foster "had not received earnings in at least twenty-five work-weeks" he was not entitled to vacation benefits.

Petitioner thereupon instituted suit in the United States District Court for the Western District of Pennsylvania on the grounds that Dravo had violated Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. §459, by denying him vacation benefits.

The District Court, in an Opinion and Order dated November 3, 1972 (Pet. App. C.), held that Foster was not entitled to vacation pay in 1967 and 1968 because he failed to satisfy the requirement of having received earnings in at least twenty-five work-weeks.

On appeal to the Court of Appeals for the Third Circuit, the Court candidly recognized that in two similar cases, circuit courts[1] eschewed careful analysis of the provisions of the collective bargaining agreements in question. While these cases were determined in a manner contrary to the instant case and a prior decision of the Tenth Circuit Court of Appeals,[2] no analysis of the earnings requirement for vacations was made in either case.

The Third Circuit recognized that matters of "seniority rights derive their scope and significance from Union contracts."[3] The Court further recognized that Collective Bargaining Agreements must be given an interpretation that is realistic in the context of the entire Collective Bargaining Agreement as a whole and the every-day realities of Labor-Management relations. The Court did not find the contract ambiguous, as alleged by the Petitioner, but stated simply, early in the Opinion, "Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work-week for any period of time without being discharged." (Pet. App. A, p. 14A). Moreover, the Court found that granting the Petitioner's request would "in effect, be granting to the returning veteran a windfall at the expense

1. *Locaynia v. American Airlines, Inc.*, 457 F.2d 1253 (9th Cir., 1972)Cert.den., 409 U.S. 982; *Ewert v. Wrought Washer Mfg. Co.*, 477 F.2d 128, (7th Cir. 1973)
2. *Kasmeier v. Chicago, Rock Island and Pacific R.R. Co.*, 437 F.2d 151 (10th Cir. 1971)
3. *Aeronautical Lodge 727 v. Campbell*, 337 U.S. 521 (1949)

of his employer and be discriminating against employees who are required to meet the conditions of the Collective Bargaining Agreement if they are to receive vacation benefits." (Pet. App. A., p. 17A).

The Third Circuit remanded the case to the District Court for a determination as to whether the issue of pro rata vacation benefits was properly raised and litigated at the trial level.

REASONS FOR DENYING THE WRIT

1. This Court has long recognized that it would be a distortion of the language and intent of the Military Selective Service Act[4] to provide returning veterans greater rights and benefits than would have been accrued to them had they not entered the military service. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275,285 (1946). To establish whether the veteran is being penalized because of the time spent in the service of his country, the Third Circuit correctly determined that the court must, in the first instance, review the Collective Bargaining Agreement in effect to determine what benefits the employees received who remained active on the employment roles of the Company. The Third Circuit determined that the employees who were not in the military service were required to receive earnings in twenty-five full work-weeks, and the Petitioner's "failure substantially to comply with this case precludes his claim to full vacation benefits." (Pet. App. A. p. 17A)

Therefore, in each case, the Court must review the Collective Bargaining Agreement and determine how the employees who did not enter the military were treated. After that determination is made, the case of the returning veteran is examined to determine if he is being prejudiced or discriminated against.

Thus, this Court, in granting the Petitioner's request, will not resolve whatever conflict may exist in the circuit courts, because each case must be determined on an individual basis. However, in no instance should the returning veteran be granted a windfall simply as a result of his having entered the military service.

4. 50 U.S.C. App. 459 et seq.

2. The question at issue concerns only the Petitioner's *eligibility* for vacation pay and not the amount of vacation to be received. The latter is clearly a perquisite of seniority, and Petitioner was given proper credit for his military term in determining the amount of his Vacation.

Petitioner believes the circuit court decisions which rely upon *Accardi v. Pennsylvania Railroad Co.*, 383 U.S. 225 (1966), and *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967), and provide credit for a veteran's military service in the determination of vacation eligibility, were correctly decided. However, in relying on *Accardi*, it must be recognized that the case involved severance pay benefits--not vacation eligibility. Moreover, any argument based on *Accardi*, in the instant situation, relies entirely on an extreme hypothesis, not recognizing the exigencies of the situation provided for in the Collective Bargaining Agreement at issue when read as a whole. Reference to other sections of the Agreement for layoffs, hiring, and most important--discharge for proper cause all guard against any prejudice to the returning veteran.

An analysis of the Collective Bargaining Agreement makes it clear that the "bizarre results" of *Accardi* are not possible here and that vacation pay is not a benefit which "automatically accrues (to a Dravo employee)." *Accardi v. Pennsylvania R. Co.*, 383 U.S. at 229-230.

Moreover, reliance on this Court's one-sentence Per Curium Opinion in *Eagar v. Magma Copper Co.*, *supra*, is also misplaced. An examination of all the facts in *Eagar* reveals that Plaintiff had completed the substantive "work requirements" in working seventy-five per cent of his available shifts in the previous year to qualify him for vacation pay. He had earned his vacation. The benefits to which he was entitled were automatic. Once the vacation is substantively earned, as in *Eagar*, it automatically accrues as a perquisite of seniority.

Furthermore, that finding does not require that all attributes of vacation fall within "seniority, status, and pay." Nor does it foreclose the use of a valid work requirement before eligibility for vacation pay accrues.

3. The issue of Foster's pro rata share of his vacation benefits for the years 1967 and 1968 is not properly before this Court. The question of pro rata benefits was never mentioned by Petitioner in his Complaint, nor was the question of pro rata relief raised by Petitioner or litigated at the trial level.

This Court has long recognized that unless there are exceptional circumstances, appellate courts consider only specific questions which were raised and litigated at the trial court level. *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241 (1949); *Dunn v. United States*, 284 U.S. 390 (1932); *Blair v. Oesterlein Co.*, 275 U.S. 220 (1927).

The Third Circuit recognized that the Complaint stated only a general claim for vacation benefits and no specific averment relating to the pro rata benefits.

It was further recognized that the District Court urged the parties to reach a compromise along the lines of providing pro rata benefit. The Third Circuit, based on the circumstances of the case, remanded any claim for pro rata benefits to the District Court for a determination of whether the question of Foster's right to pro rata benefits was properly raised in the District Court and if so raised, the District Court was to make a decision on the merits.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES R. VOLK
ROBERT H. SHOOP, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

Attorneys for
DRAVO CORPORATION

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222

24 June 1974

Supreme Court, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

No. 73-1773

In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS,
Assistant Attorney General,
HARRY R. SACHSE,
Assistant to the Solicitor General,
ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
HAROLD C. NYSTROM,
Associate Solicitor of Labor,
BOBBYE D. SPEARS,
WILLIAM H. BERGER,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutory and collective bargaining agreement provisions involved	2
Statement	5
Summary of argument	9
Argument:	
I. Vacation benefits which accrue after a veteran's return to his civilian employment and which are not merely compensation for actual work performed are a perquisite of seniority to which returning veterans are entitled under the Military Selective Service Act	11
A. The rights of returning veterans under the Act are based generally on a "moving escalator" principle	11
B. Under this Court's decisions, the "moving escalator" principle applies to fringe benefits, including vacation benefits, which are based on continuity in the employment relationship and which are not merely compensation for actual work performed	14

565 373 - 74 - - 3

Argument—Continued
II. The collective bargaining agreement in the present case shows that the vacation benefits at issue reflect continuity in employment status, rather than merely compensation for actual work performed, and that they are thus a perquisite of seniority to which petitioner is entitled ... Page 21
III. Petitioner is statutorily entitled, at the very least, to *pro rata* vacation benefits based on his actual work for the employer before and after his military service ... 24
Conclusion ... 27

CITATIONS

Cases:
Accardi v. *Pennsylvania R. Co.*, 383 U.S. 225 ... 9, 12, 15, 16, 17, 18, 19, 22, 26, 26
Austin v. *Sears, Roebuck & Co.*, C.A. 9, No. 73-2704, decided October 21, 1974 ... 7
Eagar v. *Magma Copper Co.*, 389 U.S. 323 ... 10, 17, 18, 19
Ewert v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128 ... 7, 20
Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 ... 11, 13, 19, 26
Hollman v. *Pratt & Whitney Aircraft*, 435 F. 2d 983 ... 23
Johnson v. *Robison*, 415 U.S. 361 ... 24
Kasmeier v. *Chicago, Rock Island & Pacific R. Co.*, 437 F. 2d 151 ... 7
Locaynia v. *American Air Lines, Inc.*, 457 F. 2d 1253, certiorari denied, 409 U.S. 982 ... 7
McKinney v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265 ... 13-14

Cases—Continued
Magma Copper Co. v. *Eagar*, 380 F. 2d 318, reversed, 389 U.S. 323 ... Page 17
Morton v. *Gulf, Mobile and Ohio R. Co.*, 405 F. 2d 415 ... 23
Palmarozzo v. *Coca-Cola Bottling Co.* 490 F. 2d 586, certiorari denied, June 10, 1974, No. 73-1369 ... 19, 20, 23
Tilton v. *Missouri Pacific R. Co.*, 376 U.S. 169 ... 11, 14, 26
Statute:
Military Selective Service Act, 62 Stat. 6014, as amended, 50 U.S. App. 451, *et seq.*:
Section 9, 50 U.S.C. App. 459 ... 2, 6
Section 9(b), 50 U.S.C. App. 459(b) ... 2, 11
Section 9(c), 50 U.S.C. App. 459(c) ... 2, 9, 11, 15
Section 9(c)(1), 50 U.S.C. App. 459(c)(1) ... 3
Section 9(c)(2) 50 U.S.C. App. 459(c)(2) ... 3, 9, 12
54 Stat. 885 ... 11
Miscellaneous:
Cox, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 91, 148 (1966) ... 12
Haggard, *Veterans' Reemployment Rights and the "Escalator Principle,"* 51 Bost. U. L. Rev. 539 (1971) ... 12
"Paid Vacation and Holiday Provisions," Bulletin No. 1425-9, U.S. Dept. of Labor, Bureau of Labor Statistics (June 1969) ... 19

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER, PETITIONER

v.

DRAVO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–18A) is reported at 490 F. 2d 55. The opinion and order of the district court (Pet. App. C, pp. 20A–21A) are not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 19A) was entered on December 26, 1973. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to May 25, 1974. The petition was filed on that day and was granted on October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether vacation benefits based on the performance of certain minimum work requirements for the employer during the preceding year are perquisites of seniority to which a returning veteran is entitled under Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459; and, if not, whether the veteran is in any event entitled under the Act to a *pro rata* vacation benefit based on his work for the employer before and after his military service for which vacation benefits would not otherwise be received from the employer.

STATUTORY AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS INVOLVED

Section 9 of the Military Selective Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, provides in relevant part:

* * * * *

(b) *Reemployment rights.*

In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * *—

* * * * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) * * * should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * * * *

The collective bargaining agreement provides in relevant part (A. 50–52):

Article XIV, "Vacations."

Section 1 provides:

Effective December 31, 1966, vacations for eligible employees, as defined in Section 2, will be calculated as of December 31 each year. On the first December 31 of employment he will be given four (4) hours' vacation with pay at

his base hourly rate at the time of taking the vacation for each month in which he worked ten (10) or more days between his hire date and December 31, up to a maximum of forty (40) hours. On the second December 31 of continuous employment he will be given one (1) week and two (2) days vacation of fifty-six (56) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the third December 31 of continuous employment, he will be given one (1) week and three (3) days vacation of sixty-four (64) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. On the fourth December 31 of continuous employment he will be given one (1) week and four (4) days vacation of seventy-two (72) hours with pay at his base hourly rate at the time he receives his vacation pay to be taken at such time as the Company shall designate. * * *

Section 2 provides:

In order to qualify for the foregoing vacations, an employee who has been continuously employed for two (2) or more December 31sts and has seniority on the current December 31st must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st. However, employees who are laid off during the year immediately preceding December 31 and because of such layoff do not qualify for a vacation under this Section will be given a pro rata vacation to which they might otherwise be entitled on the relationship of the weeks they did work to twenty-five (25) weeks but in no case more vacation than they would have received under this Section if they had worked twenty-five (25) weeks or more.

For purposes of eligibility for vacations, absence from work due to occupational injury or occupational disease up to twelve (12) months immediately following date of beginning of such absence will be included as time worked in the said immediately preceding twelve (12) months.

"Continuous employment" as used in this Article means continuous seniority since any break in such seniority caused by any of the reasons enumerated in Section 7 of Article X of the Agreement.

STATEMENT

Petitioner, Earl R. Foster, began work as a full-time employee of the respondent, Dravo Corporation, on August 5, 1965. He worked continuously for the company until he entered military service on March 6, 1967. Upon completing his military obligation he was reinstated to his former position with respondent on October 7, 1968, and worked the remaining 13 weeks of that year and steadily thereafter.

Under the applicable collective bargaining agreement, employees of respondent who "have received earnings" during 25 weeks of the preceding calendar year are entitled to paid vacations.[1] Because of his

[1] It was stipulated that petitioner "received all vacation benefits due him for the year 1966 before entering military service on or about March 6, 1967" (App. 9).

565-373—74——2

military service petitioner received earnings in only 9 weeks in 1967 (the year on which eligibility for a vacation in 1968 is predicated under the agreement) and 13 weeks in 1968 (on which the 1969 benefits are based) (Pet. App. A, p. 2A). On this ground respondent denied petitioner vacation benefits in both 1968, the year of his return, and 1969, his first complete year after return. By contrast, employees who began work contemporaneously with petitioner and did not go into military service received vacation benefits in both years.[2]

Petitioner filed this suit in the district court alleging that respondent violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App. 459, by refusing to count the time he spent in military service in computing his eligibility for vacation benefits. The district court granted judgment for respondent on the ground that petitioner had failed to satisfy the eligibility requirements for vacation benefits under the collective bargaining agreement in both 1967 and 1968 (Pet. App. C, pp. 20A–21A).

On appeal, the court of appeals noted that there is a conflict among the circuits as to whether vacation benefits are seniority rights protected by the Act or deferred compensation which is unprotected, where the collective bargaining agreement conferring them conditions their receipt upon the completion of a

[2] It was stipulated that petitioner was in "an other than temporary position" and would not have been laid off during his period in the military, and that employees junior to petitioner in seniority, who were not called into military service, received earnings in at least 25 work weeks of each year during the period in which petitioner was in military service (App. 8–10).

specified work period (Pet. App. A, p. 10A). The court understood the Tenth Circuit[3] to have held that a returning veteran who has not satisfied the work requirement under such an agreement is not entitled to vacation benefits, while it understood the Ninth[4] and Seventh[5] Circuits to have held that vacation benefits are seniority benefits to which a returning veteran is entitled under the Act regardless of whether he satisfies the particular eligibility requirements of the agreement (Pet. App. A, pp. 10A–12A).

The court of appeals stated that in its view the question whether a benefit conferred under a collective bargaining agreement is a perquisite of seniority is essentially one of contract interpretation, and controlling weight must be given to the probable understanding of the parties to the agreement. As the court put it, the issue is "whether the employer and the employees, through their representatives, viewed the particular benefit as additional compensation for work performed or a prerogative of seniority" (Pet. App. A, p. 12A).

Accordingly, the court of appeals examined the agreement between respondent and petitioner's union and found that "the language of the contract requiring the employee simply to receive earnings in at

[3] *Kasmeier* v. *Chicago, Rock Island & Pacific R. Co.*, 437 F. 2d 151.

[4] *Locaynia* v. *American Air Lines, Inc.*, 457 F. 2d 1253, certiorari denied, 409 U.S. 982. Recently a panel of the Ninth Circuit distinguished *Locaynia* and adopted an approach similar to the one adopted in *Kasmeier* and by the court below. *Austin* v. *Sears, Roebuck & Co.*, C.A. 9, No. 73–2704, decided October 21, 1974.

[5] *Ewert* v. *Wrought Washer Mfg. Co.*, 477 F. 2d 128.

least twenty-five weeks is arguably ambiguous" (Pet. App. A, p. 14A). But the court believed "it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full work week for any period of time without being discharged" and that "it is questionable that an arbitrator, or a court in the absence of an arbitration provision, would award such employee full vacation benefits under this contract" (*ibid.*).

The court concluded that "the labor contract in this case measures the amount of paid vacation that a worker has earned on a basis different from seniority" (Pet. App. A. p. 16A), a conclusion which was buttressed by the court's belief that the term "seniority" is generally taken to refer to a "priority factor that normally serves to protect workers' long term interest in job security" while vacation benefits are "normally and reasonably considered part of a worker's current or short term return for labor" (Pet. App. A, p. 15A). Therefore the court held that petitioner, who had not received "earnings" in 25 work weeks during either 1967 or 1968, was not entitled to full vacation benefits in either 1968 or 1969. However, the court remanded the case to the district court to consider whether petitioner was entitled under the collective bargaining agreement to a *pro rata* share of vacation benefits based on the weeks he did work in 1967 and 1968, if the district court found that that issue had been properly raised (Pet. App. A. pp. 17A–18A).

SUMMARY OF ARGUMENT

I

When Congress passed the Nation's first peacetime draft law it was concerned that servicemen not be penalized on their return to civilian employment by reason of their absence in the military. It thus provided that they should be restored to a position "of like seniority, status, and pay." 50 U.S.C. App. 459(b). When it re-enacted the statute in 1948, Congress, confirming this Court's decision in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, added that the serviceman's restoration must be with such status "as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration * * *." 50 U.S.C. App. 459(c)(2).

This Court first applied these principles in situations involving traditional seniority benefits such as promotions and rights against discharge. Then, in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, the Court applied the same rationale to severance pay. Under the contract in *Accardi* the amount of severance pay was based on length of "compensated service," and the company argued that the severance pay was therefore deferred compensation for work performed, rather than a function of seniority. This Court noted, however, that there was no direct correlation under the contract between the amount of time actually worked and the benefit provided. It therefore held that, viewed realistically, the benefit was a perquisite of seniority, protected by the Act. Accordingly, the claimant veterans in *Accardi* were

entitled to have their service time counted for severance pay purposes. In *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, the Court applied *Accardi* to vacation and holiday pay.

In our view *Accardi* and *Eagar* suggest the following principle for the situation where vacation benefits are conditioned by contract on a requirement of prior service: where the benefits are essentially correlated to the amount of actual work performed they are part of compensation and, to the extent the work has not been performed, are not protected by the Act; where they are not so correlated the benefit is based on continuity of employment and is an aspect of status or seniority protected by the Act.

II

The collective bargaining agreement in this case, like the agreement in *Accardi*, shows that the vacation benefits at issue here are not directly tied to time actually worked, but are instead a reward for continuous service. It follows that petitioner, a returning serviceman, was entitled to have his time in military service counted as time in the plant and was therefore entitled to vacation benefits in his year of return and in the next year. He should not have been deprived of paid vacations in both those years while employees equal or junior to him in seniority, but who did not go into the service, received such vacations.

III

If the Court should disagree with our contention that petitioner is entitled to full vacation benefits, he should at a minimum receive *pro rata* benefits for time

actually worked before and after his military service, regardless of whether *pro rata* benefits are authorized by the collective bargaining agreement. Anything less would penalize him because of his absence in military service—contrary to the Act's basic principle that a veteran's rights after his return are to be determined as if he had not been absent.

ARGUMENT

I

VACATION BENEFITS WHICH ACCRUE AFTER A VETERAN'S RETURN TO HIS CIVILIAN EMPLOYMENT AND WHICH ARE NOT MERELY COMPENSATION FOR ACTUAL WORK PERFORMED ARE A PERQUISITE OF SENIORITY TO WHICH RETURNING VETERANS ARE ENTITLED UNDER THE MILITARY SELECTIVE SERVICE ACT

A. THE RIGHTS OF RETURNING VETERANS UNDER THE ACT ARE BASED GENERALLY ON A "MOVING ESCALATOR" PRINCIPLE

When Congress passed the Nation's first peace-time draft law in 1940 (54 Stat. 885), it was concerned that "he who is called to the colors" not be "penalized on his return by reason of his absence from his civilian job."[6] It therefore provided, in what is now 50 U.S.C. App. 459(b), that a returning veteran is entitled to be restored to a position "of like seniority, status, and pay," and, in what is now 50 U.S.C. App. 459(c), that he is entitled to be restored to his former civilian job "without loss of seniority." The same Section also provided that a returning veteran is

[6] *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169, 170–171; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284.

entitled to "participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence."

The Act thus apparently distinguishes between seniority benefits to which the returning veteran is entitled by statute, and insurance and other benefits which are subject to contract terms for employees on leave of absence.[7] But it provides no definition of either.[8]

In re-enacting the statute in 1948, Congress added that the returning veteran should be restored to his employment

> * * * in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment. [50 U.S.C. App. 459 (c)(2).]

But "status in his employment" is not defined.

[7] In *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, 231–232, this Court noted that the legislative history of the "insurance or other benefits" clause indicates a congressional purpose to entitle "employees to receive, while in service, such benefits as their employers accorded employees on leave of absence." "Without attempting" there "to determine the exact scope of this provision," the Court held "that it was intended to add certain protections to the veteran and not to take away those which are granted him by" the Act's other provisions.

[8] One commentator has noted that "Congress passed the 1940 Selective Service Act in great haste, giving little consideration to the problems of reinstating returning servicemen in private employment." Cox, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 91, 148 (1966), commenting on *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225. See also Haggard, *Veterans' Reemployment Rights and the "Escalator Principle,"* 51 Bost. U. L. Rev. 539 (1971).

This Court first interpreted the Act in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275. It there had to decide (prior to the Act's 1948 amendment) whether a returning veteran, objecting to being "laid-off" after reinstatement, was entitled to assert not only the seniority he had at the time he went into military service but also the additional seniority he would have earned had he remained in continuous employment with the employer.[9] Noting that the Act "is to be liberally construed for the benefit of those who left private life to serve their country * * *" (*id.* at 285), the Court decided the seniority issue in favor of the veteran.

The holding in *Fishgold* established that, at least as to seniority, service in the armed forces is counted as service in the plant. This principle, which has become known as the "moving escalator principle," was explained by the Court as follows (*id.* at 284–285; emphasis supplied):

> Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * * He acquires not only the same seniority he had; *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*

The Court subsequently applied this moving escalator principle to other perquisites of seniority, such as promotions and accompanying pay increases. *Mc-*

[9] The Court rejected a contention that he could not be laid off at all.

Kinney v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265; *Tilton* v. *Missouri Pacific R. Co.*, 376 U.S. 169.[10] In these cases, the Court refined the escalator principle, in the promotion context, to distinguish between promotions that depended on the employer's discretionary choice and those which were reasonably certain to occur with normal performance. In *Tilton*, the Court held that a returning veteran, once he has completed required training, is entitled to a promotion of the latter type, with seniority in the new job as of the time he would have completed the requisite work requirements but for his period of military service (and notwithstanding the seniority date to which he otherwise would be entitled under the collective bargaining agreement). Thus, for purposes of seniority in a job to which a veteran's promotion was delayed by his period of military service, time in the service counts as time in the plant. Otherwise, on returning to his civilian employment, the veteran would have fallen behind his workmates who had not left and had moved up the promotion escalator.

B. UNDER THIS COURT'S DECISIONS, THE "MOVING ESCALATOR" PRINCIPLE APPLIES TO FRINGE BENEFITS, INCLUDING VACATION BENEFITS, WHICH ARE BASED ON CONTINUITY IN THE EMPLOYMENT RELATIONSHIP AND WHICH ARE NOT MERELY COMPENSATION FOR ACTUAL WORK PERFORMED

While the time-in-service equals time-in-plant rule thus became firmly established for purposes of tradi-

[10] The Court stated in both these cases that the language added by Congress in the Act's 1948 re-enactment (*supra*, p. 12) constituted a congressional ratification of the escalator principle. *McKinney*, *supra*, 357 U.S. at 271; *Tilton*, *supra*, 376 U.S. at 175.

tional seniority rights, questions remained as to its application to "fringe benefits," such as severance pay, holiday pay and vacation pay, which are part of the consideration bargained for in contract negotiations rather than merely a definition of relative positions between employees. Since the Act specifies that the period of military service shall be treated as a "furlough or leave of absence" from the serviceman's civilian job (50 U.S.C. App. 459(c)), it was clear that a veteran, on returning to his civilian job, would not receive back pay for his time in military service or payment for fringe benefits missed during that period, except to the extent that his employment contract might provide for such payment to employees on leave. But once he had returned, to what extent did the Act require that he be given credit for his period of military service in determining the measure and availability of fringe benefits receivable after his return?

The problem was first presented to this Court in *Accardi* v. *Pennsylvania R. Co.*, 383 U.S. 225, in which the Court unanimously held that the Act required that the veterans there involved be given credit for their time in military service in computing their severance pay. In *Accardi*, an agreement between several railroads and a tugboat firemen's union abolished the position of fireman on diesel tugs and provided that firemen who lost their jobs were to be paid a separation allowance based on the length of "compensated service" with the railroads. Under the agreement, "[a] month of 'compensated service' was defined as any month in which the employee worked one or more

days and 'a year of compensated service is 12 such months or major portion thereof.'" 383 U.S. at 228. The question was whether time in military service was to be included in computing the severance pay for veterans who had been reinstated in firemen's jobs with rights under the Act. In rejecting the railroad's contention that the severance pay was merely deferred compensation for time worked and not a perquisite of seniority protected by the Act, the Court held that the benefits guaranteed by the Act are not only the "traditional" seniority benefits, "such as work preference and order of lay-off and recall," but all benefits which automatically accrue to employees with continued employment. 383 U.S. at 229–230. As the Court explained: "The term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress" which was "to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country." *Ibid.*

In holding that the severance pay at issue in *Accardi* was not merely compensation for actual work performed, the Court noted that the contract conditioned the benefits only on the performance of work for "one or more days" per month during a majority of the 12 months of the year. It was thus "possible under the agreement for an employee to receive credit for a whole year of 'compensated service' by working a mere seven days," since there was "no distinction whatever between the man who worked one day a

month for seven months and the man who worked 365 days in a year." 383 U.S. at 230. Accordingly, the Court concluded, "the amounts of the severance payments were based primarily on the employees' length of service with the railroad"—the "real nature" of these payments was that they were perquisites of seniority. *Ibid.*

Significantly, the Court in *Accardi* did not attempt to reconstruct the agreement by speculating about whether an employee who worked only seven days in the year would have been fired (compare Pet. App. A, pp. 14a–17a). Rather, because the benefit was not correlated with actual work performed and therefore was not merely deferred compensation, the Court concluded that it was essentially a function of the length of the continuing employment relationship and therefore within the moving escalator principle of the Act's protection of all "the perquisites and benefits that flow from" seniority. 383 U.S. at 230.

While *Accardi* concerned severance pay, the Court soon had occasion to rule on similar issues regarding holiday pay and vacation benefits. Approximately one month prior to this Court's decision in *Accardi,* the Ninth Circuit had ruled in *Magma Copper Co.* v. *Eagar,* 370 F. 2d 318, that the vacation and holiday pay claimed by the veterans in that case were not attributes of status or seniority protected by the Act, but were "fringe benefits" governed (under the Act's "other benefits" clause) by the provisions of the collective bargaining agreement relating to employees on leave. The agreement in *Eagar* provided paid vacations for employees who had worked 75 percent of the

available shifts in their previous employment year (12 months commencing at date of employment) and who were on the payroll on the last day of that year. It also provided holiday pay for employees who worked the day before and after the holiday and who were on the payroll for three continuous months prior to the holiday. The veterans in that case, having gone into the service before the last day of the employment year, had not met the last day requirement for vacation pay (although they had worked the required 75 percent of the shifts in that year) and, having recently returned to work, had not been on the payroll continuously for the three months prior to the holidays in question.[11] The court of appeals therefore denied their claims for failure to meet the contractual requirements. 380 F. 2d at 319.

After *Accardi* was decided, the Ninth Circuit, in denying a petition for rehearing, purported to distinguish *Accardi* as not involving a "fringe benefit." 380 F. 2d 321–322. One judge dissented on the ground that *Eagar*, like *Accardi*, involved benefits which "'would have automatically accrued to [the veterans] had they remained in their civilian jobs' instead of entering the military service." *Id.* at 322.

This Court granted certiorari and summarily reversed on the authority of *Accardi*. *Eagar* v. *Magma Copper Co.*, 389 U.S. 323. Three dissenting Justices would have held that the length of the vacation and

[11] The facts stated are those relating to claimant Eagar and agreed by the parties in this Court to be representative of the other claims as well. See *Eagar* v. *Magma Copper Co.*, 389 U.S. 323, n. 1 (dissenting opinion).

the amount of vacation and holiday pay were functions of seniority protected by the Act, but that *entitlement* to a vacation or paid holiday was an "other benefit" governed by the contract. *Id.* at 323–326. But the Court did not accept this position, as to either vacation benefits or holiday pay.[12]

In our view, this Court's interpretations of the Act from *Fishgold* through *Accardi* and *Eagar* suggest a workable principle for the situation where vacation benefits are conditioned by contract on a requirement of prior service. Where the benefits to which the employee is entitled are essentially correlated to the amount of actual work performed,[13] the benefits are

[12] Since the contractual requirement of having worked 75 percent of the shifts in the preceding year of employment had been satisfied by the "representative" claimant in *Eagar* (see n. 11, *supra*), it is possible to interpret this Court's decision in that case as involving only a "veteran who had met the work requirements [and therefore] would have been eligible for the [vacation and holiday pay] benefits if he had simply been on the company's payroll at the relevant times whether he had been working or not." *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F. 2d 586, 595 (C.A. 2) (dissenting opinion), certiorari denied, June 10, 1974, No. 73–1369. The court of appeals opinion in *Eagar*, however, left some doubt about whether all the claimants had met the 75 percent requirement, see 380 F. 2d at 322 (dissenting opinion), and this point was not clarified in the papers filed in this Court in the case. (There was no opinion in the district court.) Since this Court reversed the judgment (as to all claimants) without opinion, it cannot be known whether its decision on the vacation issue was so narrowly based.

[13] An example would be either a Pooled or a Ratio-to-Work Plan. Under both, there is often "a direct correlation between the time an employee works and the total vacation payment" ("Paid Vacation and Holiday Provisions," Bulletin No. 1425–9, U.S. Dept. of Labor, Bureau of Labor Statistics, June 1969, p. 18) and "a flat cents-per-hour contribution [is] credited to the individual worker's account." *Id.* at 14.

merely part of the compensation for performance of that work and, to the extent the work has not been performed (see point III, *infra*), are not protected by the Act. But where the benefits are not so correlated, and the contractual requirement of prior service therefore amounts to a granting of benefits on a basis of continuity of the employment relationship rather than merely as compensation for actual work performed, the benefits are an aspect of "status" (or perquisite of "seniority") protected by the Act's escalator principle (the basic effect of which is to preserve continuity of the employment relationship during the period of military service, for purposes of whatever benefits thereafter flow from the preservation of that status).[11] Thus, as we understand the Act and this Court's interpretations of it, veterans who have returned to their civilian jobs are entitled to the same vacation benefits enjoyed by their fellow workers who remained on the job, except in the particular contractual circumstances where it is clear to all that vacation benefits are nothing more than compensation for actual work performed and that denying or diminishing them for the veteran therefore would in no way discriminate against him because of the interruption in the continuity of his employment relationship.

[11] See, *e.g.*, *Polmarozzo* v. *Coca-Cola Bottling Co.*, *supra*, 490 F. 2d at 591, n. 4 (holding that a severance pay eligibility requirement which did not include credit for overtime or for regular time in excess of 1600 hours per year "show[s] that this is a plan rewarding a continuous relationship with the company, rather than giving compensation for work actually performed"). See, also, *Evett* v. *Wrought Washer Mfg. Co.*, *supra*, 477 F. 2d at 128, 129.

II

THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT CASE SHOWS THAT THE VACATION BENEFITS AT ISSUE REFLECT CONTINUITY IN EMPLOYMENT STATUS, RATHER THAN MERELY COMPENSATION FOR ACTUAL WORK PERFORMED, AND THAT THEY ARE THUS A PERQUISITE OF SENIORITY TO WHICH PETITIONER IS ENTITLED

The collective bargaining agreement applicable in this case provides (A. 52):

> In order to qualify for the foregoing vacations, an employee * * * must have received earnings in at least twenty-five (25) workweeks in at least twelve (12) months immediately preceding the current December 31st.

Thus the agreement conditions the grant of vacation benefits upon the receipt of "earnings" in at least 25 work weeks during the immediately preceding calendar year. The agreement does not specify a minimum amount of "earnings" which must be received per week, so that it is possible for an employee who earned only one hour's wages in a given week to have that week included as one of the 25 qualifying work weeks. A minimum of 25 hours of work (one hour per week for 25 weeks) could, under this agreement, qualify an employee for exactly the same vacation benefits as would be received by an employee who worked 2000 hours (50 weeks times 40 hours) during the same year.

This lack of correlation between actual hours worked and qualification for vacation benefits, indeed the "bizarre results possible" under this agreement (as in

Accardi, supra, 383 U.S. at 230), demonstrate that the vacation benefits here are not merely deferred compensation. Viewed realistically, the "earnings" requirement is a device for ascertaining those employees who have been continuously employed by respondent. The vacation benefits here, in effect, accrue automatically with length of continuous service; they are thus a particularly clear example of a perquisite of seniority to which petitioner, a returning veteran, is entitled under the Act.

Nor was this conclusion properly avoided by the court of appeals' speculation (see p. 8, *supra*) that an employee who satisfied the 25 weeks' "earnings" requirement by the extreme example of working a mere one hour per week or who otherwise worked "substantially less than the number of hours customarily regarded as constituting a full work week" would have been discharged. This Court in *Accardi* engaged in no such speculation about whether the employer there would have discharged an employee who satisfied the year of "compensated service" requirement in that case by working a mere one day per month for seven months. In each case what is important is that the benefits conferred do not depend essentially on the amount of work performed, and that the service requirement therefore is a method of rewarding continuity in the employment relationship rather than of ascertaining compensation to be awarded for actual work performed.

The court of appeals therefore erred, in our view, in undertaking a speculative inquiry which placed it

in a role comparable to that of a labor arbitrator reforming a contract to reflect what he believes the signatories must have intended. This is a particularly inappropriate approach to cases under this Act because, as the Second Circuit has recognized, "the man in the military is not represented at the bargaining table and * * * any special status accorded veterans is an inconvenience to union and management alike." *Palmarozzo* v. *Coca-Cola Bottling Co., supra,* 490 F. 2d at 592. Instead, we submit, the courts should seek to apply the Act so as to fulfill the legitimate expectations of returning veterans, while avoiding undue niceness of interpretation that would generate further litigation. As the Eighth Circuit has stated, the rights conferred by the Act should "not * * * be eroded by fine factual distinctions. Congress has painted veteran's re-employment benefits with a full brush and not with a narrow stylus." *Morton* v. *Gulf, Mobile and Ohio R. Co.,* 405 F. 2d 415, 419.

And, with particular pertinence to the kind of benefits involved here, the Fifth Circuit has correctly pointed out that in "these times of relatively high wages and steep income taxes, unions bargain vigorously for indirect compensation in the form of a host of diverse benefits. Whether the benefits are elements of 'seniority' or 'other benefits,' the veteran's stake in them must be protected if they would automatically accrue to him but for induction. Clearly, the exclusion of veterans from benefits that have come to be regarded as essential perquisites of employment

is inconsistent with the [Act]." *Hollman* v. *Pratt & Whitney Aircraft*, 435 F. 2d 983, 989.[15]

III

PETITIONER IS STATUTORILY ENTITLED, AT THE VERY LEAST, TO PRO RATA VACATION BENEFITS BASED ON HIS ACTUAL WORK FOR THE EMPLOYER BEFORE AND AFTER HIS MILITARY SERVICE

Should the Court disagree with our contention in points I and II, *supra*, that petitioner is entitled to credit for his military service in determining his eligibility for paid vacations after his return to his civilian employment, we submit that his right under the Act to *pro rata* vacation benefits based on his 9 weeks of work for the company in 1967 and 13 weeks in 1968

[15] Under the principle that time in military service counts as time in the plant, a returning veteran is entitled to vacation benefits even if he returns late in the work year. In order to receive the benefits of the Act, the veteran must report to work within 90 days after his discharge; he thus can neither manipulate nor choose the season in which he returns to work. Nor is a different result warranted by the court of appeals' concern that full vacation benefits for a returning veteran might constitute something of a windfall, in light of the military leave presumably received during his period of military service. It is unrealistic to equate military leave, in the varying contexts and situations in which it arises, with vacations from civilian employment. As this Court recently stated in a different context in *Johnson* v. *Robison*, 415 U.S. 361, 379:

"Military veterans suffer a far greater loss of personal freedom [than those who remain in civilian employment] during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty. Congress was acutely aware of the peculiar disabilities caused by military service, in consequence of which military servicemen have a special need for readjustment benefits."

should not depend, as the court below held, on whether *pro rata* benefits are available under the collective bargaining agreement to employees on leave.

As already noted, the basic principle underlying Section 9 of the Act is that "he who is 'called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job'" (*Tilton* v. *Missouri Pacific R. Co.*, *supra*, 376 U.S. at 171). Here, the 9 weeks petitioner worked in 1967 would have entitled him to 9/25 of the normal vacation benefit in 1968 had he remained on the job in 1967 instead of entering military service, and the 13 weeks he worked upon his return in 1968 similarly would have entitled him to 13/25 vacation benefit in 1969. To deny him even a *pro rata* share of vacation benefits based on these partial fulfillments of the contractual requirement (and thus to leave him without any vacation benefits for one year and thirteen weeks after his return to his civilian job) would penalize petitioner because of his absence in military service,[16] and this the Act forbids. This conclusion, we submit, would be unmistakably clear in the absence of the Act's "other benefits" clause, which appears to make certain of the rights conferred dependent on how the contract treats employees on leave. But, as previously noted (*supra*, p. 12, n. 7), this Court expressly held in *Accardi* that the "other benefits" clause was not intended to take away the rights granted elsewhere in the

[16] Indeed, petitioner would not even be treated as well as a new employee, who is entitled under the contract to a vacation in the year he first starts working on the basis of "(4) hours' vacation with pay * * * for each month in which he worked ten (10) or more days between his hire date and December 31 * * *" (A. 50).

Act—and it certainly should not be the basis for abrogating the Act's basic principle, reaffirmed in the 1948 amendment, that a veteran's rights after his return are to be determined as if he had not been absent during his period of military service.

Accordingly, it is our view that, even in the narrow circumstances where vacation benefits are merely part of the employee's compensation for actual work performed, the Act entitles a returning veteran to a *pro rata* share of vacation benefits based on his time worked during the qualifying period, regardless of whether that time satisfies the contractual minimum requirement for qualifying and regardless of how the contract treats employees on non-military leaves of absence.[17] It follows, *a fortiori*, that the Act entitles petitioner to no less than a *pro rata* share of vacation benefits, and the judgment of the court below should, at a minimum, be modified accordingly. For the reasons stated in points I and II, *supra*, however, we contend that in the circumstances here petitioner was entitled to full vacation benefits in both 1968 and 1969 and the judgment, accordingly, should be reversed.

[17] It is, of course, settled that no contractual provision purporting to deal specifically with absence for military service can diminish the rights granted by the Act. See *Fishgold*, *supra*, 328 U.S. at 285; *Accardi*, *supra*, 383 U.S. at 229.

CONCLUSION

The judgment of the court of appeals should be reversed, or, in the alternative, modified to require the granting of *pro rata* vacation benefits.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys.

WILLIAM J. KILBERG,
Solicitor of Labor,

HAROLD C. NYSTROM,
Associate Solicitor of Labor,

BOBBYE D. SPEARS,
WILLIAM H. BERGER,
Attorneys,
Department of Labor.

DECEMBER 1974.

U.S. GOVERNMENT PRINTING OFFICE 1974

In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER, *Petitioner*

v.

DRAVO CORPORATION, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for the Respondent

ROBERT H. SHOOP, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Respondent

JAY A. ERSTLING
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222

Financial Press Corporation, Pittsburgh

INDEX

	Page
Counter-Statement of the Questions Presented	1
Applicable Collective Bargaining Agreement Provisions Not Included in the Brief for Petitioner	2
Counter-Statement of the Case	4
Summary of Argument	7
Argument:	
I. Vacation benefits which are based on earnings requirements do not automatically accrue with length of service and thus are not perquisites of seniority within the meaning of the Military Selective Service Act	9
A. Congress did not intend to discriminate in favor of the returning veteran	9
B. Perquisites of seniority to which veterans are statutorily entitled constitute only those benefits which automatically accrue with length of service; entitlement to other benefits is predicated upon the fulfillment of the valid prerequisites embodied in the collective bargaining agreement	13
C. Vacation pay entitlement based on a valid earnings requirement is compensation for work done and thus is not a perquisite of seniority	15
II. The collective bargaining agreement in the present case indicates that vacation entitlement is predicated upon the fulfillment of a valid earnings requirement and thus vacation entitlement is an other benefit to which Petitioner is not entitled	20
III. Petitioner is not entitled to a pro rata share of his vacation benefits for 1967 and 1968, nor is the issue of Petitioner's right to pro rata benefits properly before this Court	23
Conclusion	26

TABLE OF CITATIONS

CASES

Page

Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966) 7, 14, 15, 18, 20, 21

Aeronautical Lodge 727 v. Campbell, 337 U.S. 521 (1949) 5, 11

Austin v. Sears Roebuck & Co., 504 F.2d 1033 (9th Cir. 1974) 16, 18, 22

Bachmann Uxbridge Worsted Corp., 23 LA 596 (Hogan 1954) 17

Blackford Glass Co., 11 AAA 20 (Sembower) 17

Blair v. Oesterlein Co., 275 U.S. 220 (1932) 24

Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970) 17, 20

Dougherty v. General Motors Corp., 176 F.2d 561 (3rd Cir. 1949) 18

Dugger v. Missouri Pacific R. Co., 276 F. Supp. 496 (S.D. Tex. 1967) 19

Dwyer v. Crosby Co., 167 F.2d 567 (2nd Cir. 1948) 18

Eagar v. Magma Copper Co., 389 U.S. 323 (1967) 16

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946) 10, 11, 24

General Tire & Rubber Co. v. Local 512, 191 F. Supp. 911 (D.R.I. 1961) 17

Goodell-Sanford, Inc. v. United Textile Workers, 233 F.2d 104 (1st Cir. 1956) 17

In re Public Ledger, Inc., 161 F.2d 762 (3rd Cir. 1947) 17

In re Wil-Low Cafeterias, Inc., 111 F.2d 429 (2nd Cir. 1940) 17

Page

Kasmeier v. Chicago, Rock Island & Pacific R. Co., 437 F.2d 151 (10th Cir. 1971) 16

Kroger Co., 37 LA 126 (Reid 1961) 17

Locaynia v. American Airlines, 457 F.2d 1253 (9th Cir. 1972) 16

McGrath v. Manufacturer's Trust Co., 338 U.S. 241 (1949) 24

McKinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265 (1958) 11, 12, 13

Palmerozzo v. Coca-Cola Bottling Co., 490 F.2d 586 (2nd Cir. 1973) 22

Tilton v. Missouri Pacific R. Co., 376 U.S. 169 (1964) 12, 13

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 17

Vaca v. Sipes, 386 U.S. 171 (1967) 21

STATUTES

Military Selective Service Act, 62 Stat 604, as amended, 50 U.S.C. App. §451 *et. seq.*:

Section 9, 50 U.S.C. App. §459 5

Section 9(b), 50 U.S.C. App. §459(b) 9

Section 9(c), 50 U.S.C. App. §459(c) 11, 23

Section 9(c)(1), 50 U.S.C. App. §459(c)(1) 9, 10, 12, 13, 14, 25

Section 9(c)(2), 50 U.S.C. App. §459(c)(2) 11, 12

Page

Selective Training and Service Act, 54 Stat. 885 9

76 Stat. 492, as amended, 10 U.S.C. § 701 19

MISCELLANEOUS

86 Cong. Rec. 10107 (1940) 10

86 Cong. Rec. 10761 (1940) 10

Cox, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 91 (1966) 15

Haggard, Veterans' Reemployment Rights and *"The Escalator Principle,"* 51 Bost. U.L. Rev. 539 (1971) 9, 10, 14, 15, 16

M. Stone, Labor-Management Contracts at Work (1961) . 17

Oswald & Smyth, *The Veteran Returns to the Job*, 76 Am. Fed. 19 (Oct. 1969) 21

"Paid Vacations and Holiday Provisions," Bulletin No. 1425-9, U.S. Department of Labor, Bureau of Labor Statistics, June 1969 19

S. Rep. No. 1268, 80th Cong., 2nd Sess. (1948) 11

"Veterans Reemployment Rights Handbook," U.S. Department of Labor, Labor-Management Services Administration, 1970 21

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1773

EARL R. FOSTER, Petitioner

v.

DRAVO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

(1) Whether a returning veteran, solely by reason of his military service, is entitled to accrue and automatically earn vacation pay benefits for the years spent in the military without having met the valid earnings requirements set forth in the collective bargaining agreement.

(2) Whether the issue of a returning veteran's right to pro rata vacation benefits may be determined by the Supreme Court although it was not raised or litigated at the trial level; and if so, whether a returning veteran is entitled to pro rata vacation benefits solely by reason of his military service in the absence of a contractual grant of pro rata benefits.

APPLICABLE COLLECTIVE BARGAINING AGREEMENT PROVISIONS NOT INCLUDED IN THE BRIEF FOR PETITIONER

The relevant provisions of the collective bargaining agreement not included by Petitioner are as follows:

Article V, "Discharge of Employees"

Section 1 provides:

> The right to discharge or discipline employees shall be the perogative of the Company, except that no discharge or disciplinary action shall be made without proper cause.

* * * * *

Article X, "Seniority"

Section 7 provides:

> Employees shall lose all seniority rights in all job classifications in which they have such seniority rights if:
>
> e. They are absent from work without explanation for a period of five (5) work days. Where there is good cause for such absence, the reason for the absence may be explained after the end of the five (5) days without loss of seniority.

* * * * *

Article XIV, "Vacations"

Section 3 provides:

> Where an eligible employee has worked a six (6) day week for not less than thirteen (13) nor more than twenty-five (25) weeks during said twelve (12) months, he shall be granted an additional four (4) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.
>
> Where an eligible employee has worked a six (6) day week for twenty-six (26) or more weeks during said twelve (12) months, he shall be granted an additional eight (8) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

COUNTER-STATEMENT OF THE CASE

Petitioner Earl R. Foster was initially employed by Dravo Corporation on August 5, 1965, and worked for Dravo until he was inducted into the armed services of the United States on March 6, 1967. When Foster left Dravo, he was awarded all vacation benefits due him. Petitioner served in the military until October 1, 1968, and was restored to his previous position by Dravo on October 7, 1968. Upon his return to work, he was given credit for his military term in computing the length of his vacation benefits (App., p.64).

After his reinstatement, Foster requested that Dravo grant him vacation pay for 1967 and 1968, the years of his military service.[1] The applicable collective bargaining agreement provision provides that an employee, to be eligible for vacation benefits, "must have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st" (App., p.52). Since Foster had performed work for Dravo only nine weeks in 1967 and only thirteen weeks in 1968, Dravo denied Petitioner's request (Pet. App.A, p.2A). Dravo's refusal was predicated on the belief that because Foster had not received earnings in "at least twenty-five (25) workweeks," he was not entitled to vacation pay.

Petitioner thereupon instituted suit in the U.S. District Court for the Western District of Pennsylvania, alleging that

1 The record establishes conclusively that the vacation benefits in contention are for the years 1967 and 1968 (Pet. App.A, p.1A [Opinion of the Third Circuit Court of Appeals]; Pet. App.C, p.20A [Opinion of the District Court]; App., p.10 [Stipulation 10 of Stipulations of Fact filed in district court]). Petitioner, in its Brief to the Third Circuit presented the question as concerning vacation pay for 1967 and 1968. Petitioner here, possibly not fully understanding the nature of vacation benefits, mistakenly argues that the vacation benefits in question are for the years 1968 and 1969. (Brief for Petitioner at 6).

Dravo had violated Section 9 of the Military Selective Service Act, as amended, 50 U.S.C. App.§ 459, by denying him vacation benefits. The district court, in an Opinion and Order dated November 3, 1972 (Pet.. App.C, pp.20A-21A), held that Foster was not entitled to vacation pay in 1967 and 1968 because he failed to satisfy the requirement of having received earnings in at least twenty-five workweeks.

Following the decision of the district court, Petitioner appealed to the Court of Appeals for the Third Circuit. The Third Circuit perceived that matters of "seniority rights derive their scope and significance from Union contracts"[2] (Pet. App.A, p.14A). The court further recognized that vacation entitlement benefits must be realistically interpreted in the context of the collective bargaining agreement as a whole (Pet. App.A, p.12A), giving due regard to the every-day realities of labor-management relations (Pet. App.A, p.15A). The court did not find the contract obscure, as alleged by Petitioner, but simply stated that, "Although the language of the contract requiring the employee simply to receive earnings in at least twenty-five weeks is arguably ambiguous, it is not realistic to surmise that any employee could work for substantially less than the number of hours customarily regarded as constituting a full workweek for any period of time without being discharged" (Pet. App.A, p.14A). Moreover, the Court found that granting the Petitioner's request would "in effect, be granting to the returning veteran a windfall at the expense of his employer and be discriminating against employees who are required to meet the conditions of the collective bargaining agreement if they are to receive vacation benefits" (Pet. App.A, p.17A).

Having found that Foster was not entitled to full vacation pay for the years 1967 and 1968, the appeals court

2 *Aeronautical Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

remanded the case to the district court for a determination as to whether the issue of pro rata vacation benefits was properly raised and litigated at the trial level and, if so, for a decision on the merits of his claim to pro rata benefits (Pet. App.A, p.18A).

SUMMARY OF ARGUMENT

I

When Congress first enacted the Military Selective Service Act, 50 U.S.C. App.451 *et seq.*, as amended, it sought to protect servicemen by guaranteeing that they would not be penalized on their return to civilian employment in the exercise of the various rights granted by collective bargaining agreements. Congress thereby provided that veterans are entitled to be credited with all seniority benefits for the period of their military service and, in addition, with all other benefits to which employees on furlough or leave of absence are entitled. Congress did not intend to discriminate in favor of returning veterans by granting them greater benefits than they would have received as a matter of right had they not entered the military.

The distinction between seniority and other benefits was analyzed by this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). The Court determined that the categorization of contractual benefits into the two classifications must depend upon the real nature of the benefit in question and not upon the mere use of labels. When a benefit automatically accrues to an employee based upon his length of service with the employer, the benefit should be classified as a perquisite of seniority. When a benefit must be earned, however, and represents deferred compensation for work done, it is an other benefit and must be classified accordingly.

Courts and arbitrators concur that the real nature of vacation benefits which are based upon the fulfillment of an earnings requirement is deferred compensation. Thus vacation benefits are one of the other benefits within the meaning of the Act. A contrary conclusion would result in favored

treatment to the veteran at the expense of the non-veteran employee.

II

The collective bargaining agreement in the present case conditions entitlement to vacation benefits upon the fulfillment of an earnings requirement. Because the requirement is a valid one, the bizarre results possible in some contractual provisions which attempt to disguise the real nature of the benefit being granted, are not present in this case. Since Petitioner did not meet the prerequisites to earning a vacation, he is not entitled to vacation pay.

III

Petitioner asserts that at the very least he is statutorily entitled to pro rata vacation benefits. This issue is not properly before the Court as it has never been litigated, nor has it been determined whether it was properly raised below. Should this Court decide to consider the issue, however, Petitioner is not entitled, in the absence of a contractual grant, to pro rata benefits. Congress did not intend to create new rights for the veteran; it intended only to preserve those rights accorded by the collective bargaining agreement.

ARGUMENT

I VACATION BENEFITS WHICH ARE BASED ON EARNINGS REQUIREMENTS DO NOT AUTOMATICALLY ACCRUE WITH LENGTH OF SERVICE AND THUS ARE NOT PERQUISITES OF SENIORITY WITHIN THE MEANING OF THE MILITARY SELECTIVE SERVICE ACT.

A. Congress did not intend to discriminate in favor of the returning veteran.

In 1940, in an effort to prepare for the inevitable onslaught of World War II, Congress enacted the Selective Training and Service Act, 54 Stat. 885.[3] The primary purpose of the 1940 Act was to draft men for a year of precautionary training.[4] However, Congress also sought to ensure that the servicemen's absence in the military would not deprive them of reinstatement in their civilian jobs and thus Congress created reemployment rights for the returning veterans.[5]

The reemployment rights enacted by the 1940 Congress are presently embodied in the Military Selective Service Act of 1967 (hereinafter referred to as the Act), 50 U.S.C.App. §459(b) and (c)(1). Section 459(b) requires any employer to restore the veteran to the job which he held before he entered the military "or to a position of like seniority, status, and pay." Section 459(c)(1) of the Act provides that a veteran who is so restored:

---

3 The reemployment rights provision of the 1940 Act was re-enacted in the Universal Military Training & Service Act of 1948, 50 U.S.C. App. §§451-73, as amended by the Military Selective Service Act of 1967, 50 U.S.C.App. §§451-67.

4 Haggard, *Veterans' Reemployment Rights and "The Escalator Principle,"* 51 Bost. U.S. Revl. 539, 539 (1971) (hereinafter referred to as *Haggard*).

5 *Haggard* at 539.

> ***Shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

It is thus evident that Congress desired to restore the veteran to his pre-military position of employment and to differentiate between seniority and other benefits. It was not, however, initially clear whether Congress intended the veteran's seniority to accumulate during his term of service or whether it intended to preserve for the veteran only such seniority as had accumulated prior to his entering the military.[6]

This conflict was soon resolved by the Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), in which it was held that a veteran may be laid off in accordance with the seniority provisions of the applicable collective bargaining agreement during the veteran's first year of return to employment. This case has served as the foundation of all subsequent interpretations of the Act.

Although it held that a veteran is statutorily entitled to accumulate seniority during the tenure of his military service[7], the Court in *Fishgold* carefully pointed out that the

6 See remarks of Senators Danaher and Sheppard at 86 Cong.Rec. 10107 (1940); remarks of Congressman May at 86 Cong.Rec.10761 (1940); and *Haggard* at 542-543.

7 "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position during the war." *Fishgold, supra*, 328 U.S. at 284-285.

seniority to which the veteran is entitled is only that which flows from the applicable collective bargaining agreement.[8] Thus, the returning veteran is entitled to no greater benefits than would have accrued to him had he not entered the military service.[9] The intent of Congress was to ensure that "he who was called to the colors was not to be penalized on his return***" (*Id.* at 284); in no way did Congress intend to discriminate in favor of the returning veteran.

The *Fishgold* decision was codified in 1948 when Congress enacted Section 459(c)(2) of the Act.[10] Congress did not intend to broaden the ambit of seniority benefits to which the returning veteran is entitled, nor did it attempt to alter the distinction between seniority and other benefits. Thus the intent of Congress remained unchanged. The veteran was not to be granted a "step-up or gain in priority" by virtue of his military service. *Fishgold, supra*, 328 U.S. at 286.

The Supreme Court affirmed its interpretation of the Act in two subsequent decisions incorrectly relied upon by Petitioner in this case. In *McKinney v. Missouri-Kansas-Texas*

8 "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system***" *Id.* at 288. See also *Aeronautical Lodge 727 v. Campbell, supra*, 337 U.S. at 526.

9 "But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the Armed Services." *Fishgold, supra*, 328 U.S. at 285. See also *Id.* at 286 where the Court stated: "Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority mean no more."

10 S.Rep. No.1268, 80th Cong.,2d Sess.(1948).

R. Co., 357 U.S. 265 (1958), and in *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169 (1964), the Court dealt with a veteran's right to promotion. In both cases the Court held that a veteran is not automatically entitled to a promotion which is based upon managerial prerogative or satisfactory completion of a trainee requirement simply because he served in the military.[11]

In *McKinney*, *supra*, 376 U.S. at 271-272, Justice Frankfurter stated:

> However, § 9(c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance, to which he cannot lay claim under the statute. Section 9(c) does not assure him that the past with all its possibilities of betterment will be recalled. Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

Justice Goldberg, writing for the Court in *Tilton*, *supra*, 376 U.S. at 181 concurred with Justice Frankfurter:

[11] In *Tilton*, *supra*, the Court further determined that once the veteran satisfies the training requirement he is entitled to a seniority date reflecting the delay caused by military service. Since the seniority date is akin to the length of vacation benefits and not to vacation entitlement, this aspect of the Court's holding is irrelevant to the determination of the present case.

> This does not mean that under §§ 9(c)(1) and 9(c)(2) the veteran, upon returning from service, must be considered for promotion or seniority purposes as if he had continued to work on the job. A returning veteran cannot claim a promotion that depends solely upon satisfactory completion of a prerequisite period of employment training unless he first works that period.

Once again the Court made it clear that the returning veteran is not to be accorded privileged status. Furthermore, in *McKinney*, *supra*, the Court reaffirmed its earlier determination that a veteran's actual reemployment rights derive not from the Act but from the applicable collective bargaining agreement.[12]

Thus, Congress intended the Act to have important but limited effects. It did not intend to create new rights for the veteran but rather to guarantee that he would not be penalized in the exercise of rights granted by the collective bargaining agreement. Congress did not intend to place the veteran in a better position than those who did not serve in the military.

B. Perquisites of seniority to which veterans are statutorily entitled constitute only those benefits which automatically accrue with length of service; entitlement to other benefits is predicated upon the fulfillment of the valid prerequisites embodied in the collective bargaining agreement.

While the intent of Congress in creating the Act was thus clearly determined by this Court, the definition of seniority, and hence the distinction between seniority preroga-

[12] The Court stated: "Under Rule 1(3)(A) of the collective bargaining agreement (promotion) is dependent on fitness and ability and the exercise of a discriminating managerial choice. Collective bargaining agreements that include such familiar provisions are presupposed by the statute and it is in their context that it must be placed." *McKinney v. Missouri - Kansas - Texas R. Co.*, *supra*, 357 U.S. at 272.

tives and other benefits, still required clarification. The difference between the two is crucial: whereas a returning veteran is required by the Act to be credited with all perquisites of seniority, he is not entitled to receive other benefits unless the collective bargaining agreement or an existing practice clearly provides that employees on furlough or leave of absence receive such benefit. 50 U.S.C. App. § 459(c)(1)

The Supreme Court subsequently analyzed and defined the nature of seniority and those benefits derived from it in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966). *Accardi* concerned veterans' demands that the employer include the time they spent in the military in computing the amount of severance pay due them. The Court granted the demands because the claimed benefit was, in practical and actual effect, a perquisite of seniority.

The most important aspect of *Accardi* is the Court's analysis of the concept of seniority. *Haggard* at 571. The Court affirmed that the term "derives its content from private employment practices and agreements," *Accardi v. Pennsylvania R. Co., supra*, 383 U.S. at 229. It further declared that Congress' intention in protecting the seniority rights of veterans "was to preserve for the returning veterans the rights and benefits which would have *automatically accrued* to them had they remained in private employment rather than responding to the call of their country." *Id.* at 229-30 (emphasis added). The critical issue, therefore, is the determination of those benefits which automatically accrue.

The categorization of the severance payments as benefits which automatically accrue was based on the Justices' determination of the integral nature of the benefit. The Court concluded that "the *real nature* of these payments was compensation for loss of jobs," the value of which was determined "by the rights and benefits (the employee) forfeits by giving up his job." *Id.* at 230 (emphasis added). Because "the

number and value of the rights and benefits increase in proportion to the amount of seniority***it is only natural that those with the most seniority should receive the highest allowances." *Ibid.* The Court, therefore, determined that "there can be no doubt that the amounts of severance payments were based primarily on employees' length of service with the railroad." *Ibid.* The "use of transparent labels and definitions" (*Id.* at 229), which produce "bizarre results" (*Id.* at 230), cannot disguise this fact.[13]

It is apparent from this Court's decision that seniority is to be defined as the employee's length of service with the employer.[14] Thus if a benefit automatically accrues with length of service, the veteran is entitled to credit his tenure in the military toward receipt of that benefit. However, if the benefit does not automatically accrue but rather represents compensation for work done, the benefit must be classified as an other benefit to which the veteran is not entitled unless the work is actually performed.

C. Vacation pay entitlement based on a valid earnings requirement is compensation for work done and thus is not a perquisite of seniority.

The Supreme Court had only one opportunity to analyze a veteran's request for vacation benefits for the years

13 The Petitioner asserts that the primary reason for the Court's determination in *Accardi* was that "(I)t was 'possible under the Agreement for an employee to receive credit for a whole year of "compensated service" by working a mere seven days,' " thus producing "bizarre results" (Brief for Petitioner at 16, 21). However, according to Archibald Cox in *The Supreme Court, 1965 Term*, 80 Harv.L.Rev. 91, 149 (1966), "This line of reasoning (asserted by Petitioner) is unconvincing" and, therefore, "did not constitute the principal basis of the Court's decision." Cox believes, as stated herein, that the Court based its decision on its finding that the "real nature" of severance pay is "compensation for length of service with the employer" *Ibid.*

14 See *Haggard* at 572.

spent in the military and that case is clearly distinguishable from the present matter.[15] In *Eagar v. Magma Copper Co.*, 389 U.S. 323 (1967) (per curiam), the collective bargaining agreement conditioned the receipt of vacation benefits upon the fulfillment of three requirements, only the last of which constitutes a valid earnings requirement: employment with the company for one year; employment on the last day of the vacation-earning year; and completion of at least 75 percent of the available shifts during the vacation-earning year. Eagar had worked 75 percent of the available shifts but was denied vacation pay because he had failed to meet the remaining requirements. Eagar, therefore, fulfilled the valid work requirements and earned his vacation.[16] Hence, "[t]here is no reason to believe that the Court viewed the 75 per cent-of-shifts-requirement as anything but a bona fide work requirement which must actually be satisfied."[17]

The real nature of vacation entitlement is compensation for work done. It is not based on length of service with the

---

15 See *Kasmeier v. Chicago, Rock Island & Pacific R. Co.*, 437 F.2d 151 at 154-55 (10th Cir. 1971); *Austin v. Sears Roebuck & Co.*, 504 F.2d 1033 at 1037 (9th Cir. 1974); *Locaynia v. American Airlines*, 457 F.2d 1253 at 1260 (9th Cir. 1972) (dissenting opinion); and *Foster v. Dravo*, Pet. App.A, p.9A.

16 Petitioner asks the Court not to rely on this interpretation of *Eagar* since "the Court of Appeals opinion *** left some doubt about whether all the claimants had met the 75 percent requirement" (Brief for Petitioner at 19). Whether or not all the claimants actually met the requirements is irrelevant, however, since "[t]he Solicitor General and respondent agree that the facts in Eagar's case are representative of the other petitioners' cases, and this Court is asked to resolve the legal dispute on the basis of these facts." *Eagar v. Magma Copper Co., supra*, 389 U.S. at 323 n.1 (dissenting opinion).

17 *Haggard* at 575.

employer but must be earned in order to be granted. This view of vacation benefits is the one traditionally accepted by the courts. In *General Tire & Rubber Co. v. Local 512*, 191 F.Supp.911, 914 (D.R.I. 1961), *affd. per curiam*, 294 F.2d 957 (1st Cir. 1961), the district court, while holding that an employer was obligated to arbitrate the union's vacation pay claims, stated that, "Vacation pay is in the nature of deferred compensation in lieu of wages earned each week the employee works and payable at some later time." The Second Circuit also recognized that "[a] vacation with pay is, in effect, additional wages." *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429, 432 (2nd Cir. 1940).[18]

Moreover, as hereinbefore stated, resort must be made to the collective bargaining agreement to determine the nature of the benefit under review. This Court has uniformly recognized that labor arbitrators are especially adept at interpreting labor agreements.[19] Arbitrators concur with the courts that vacation entitlement based on the fulfillment of an earnings requirement is deferred compensation.[20]

This interpretation of the essence of vacation entitlement is crucial to a proper analysis of the vacation provision of a collective bargaining agreement. The manner in which a benefit has been traditionally construed indicates an "appreciation of the background understandings shared by the par-

---

18 See also *In re Public Ledger, Inc.*, 161 F.2d 762 (3rd Cir. 1947); and *Goodell-Sanford, Inc. v. United Textile Workers*, 233 F.2d 104 (1st Cir. 1956).

19 See generally *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

20 M. Stone, Labor-Management Contracts at Work, 154 (1961) ("Paid vacations has often been referred to as a form of deferred earnings."). See also, *Bachmann Uxbridge Worsted Corp.*, 23 LA 596 at 602 (Hogan 1954); *Kroger Co.*, 37 LA 126 at 129 (Reid 1961); and *Blackford Glass Co.*, 11 AAA 20 (Sembower).

ties." *Foster v. Dravo*, Pet.App.A,p.15A. It thus enables the courts to pierce the "transparent labels and definitions" found in labor contracts, *Accardi, supra*, 383 U.S. at 229, and glean the provision's true intent. It was just such an understanding that enabled the Ninth Circuit to conclude:

> A paid vacation is fairly understood as part of a worker's short-term return for labor; hence, treating vacation time earned as a function of actual labor performed is not unreasonable. *Austin v. Sears Roebuck & Co., supra*, 504 F.2d at 1037.[21]

Vacation entitlement provisions of collective bargaining agreements which are based on valid earnings requirements are thus other benefits and not perquisites of seniority.

A contrary determination would discriminate in favor of the returning veteran, to the detriment of the non-veteran, a result clearly not intended by Congress. Were this Court to decide that a veteran is automatically entitled to receive vacation benefits by virtue of his military service, one group of employees (returning veterans) would be freed from meeting the contractual conditions upon which the benefits are predicated while all other employees would still have to meet them. As the court of appeals below reasoned, this would obviously result in a windfall to the veteran and a denial of equal treatment to employees on furlough or leave, who, because they failed to meet the earnings requirement, would not be receiving vacation pay (Pet. App.A, p.17A). The intent of Congress was to place veterans on a parity with employees on leave, not to grant them special privileges.

Moreover, a contrary determination would entitle the veteran to receive vacation benefits from both his employer

21 See also *Dougherty v. General Motors Corp.*, 176 F.2d 561 at 563 (3rd Cir. 1949), *cert. denied* 338 U.S. 956(A50); and *Dwyer v. Crosby Co.*, 167 F.2d 567 (2nd Cir. 1948).

and the Federal Government for the period of the veteran's military service. 10 U.S.C. § 701 provides that "A member of an armed force is entitled to leave at the rate of 2-1/2 calendar days for each month of active service." It would be far-fetched to imagine that Congress desired a serviceman to receive double vacation pay.[22]

Petitioner suggests that only provisions such as pooled or ratio-to-work vacation plans should qualify as other benefits within the meaning of the Act. This suggestion is unworkable as applied to the facts of the present case as well as to most collective bargaining situations. The plans proposed by the Petitioner are seldom found in labor contracts. They are geared solely to whose industries where workers tend to shift among employers and where there is a substantial amount of seasonal employment. A pooled plan does not require a direct correlation between the time worked and the vacation benefit; it merely implies that employers deposit the employees' vacation pay into a joint fund. The purpose of a ratio-to-work plan is primarily to prevent seasonal employees from receiving vacation benefits ("Paid Vacation and Holiday Provisions," Bulletin No. 1425-9, U.S. Department of Labor, Bureau of Labor Statistics, June 1969, pp. 4, 13).

It would seriously hamper free collective bargaining if this Court were to require the exactitude and rigidity that Petitioner seeks. In view of the fact that "Congress did not intend to take the employees' place at the bargaining table,"[23] it is doubtful that Congress intended to disregard meaningful qualifying provisions reached through collective bargaining.

22 Military Leave is the same as a paid vacation, *Austin v. Sears Roebuck & Co., supra*, 504 F.2d at 1037. It is not, as Petitioner implies, a readjustment benefit (Brief for Petitioner at 24).

23 *Dugger v. Missouri Pacific R. Co.*, 276 F.Supp. 496, 499 (S.D. Tex. (1967), *affd. per curiam*, 403 F.2d 719 (5th Cir. 1968).

II THE COLLECTIVE BARGAINING AGREEMENT IN THE PRESENT CASE INDICATES THAT VACATION ENTITLEMENT IS PREDICATED UPON THE FULFILLMENT OF A VALID EARNINGS REQUIREMENT AND THUS VACATION ENTITLEMENT IS AN OTHER BENEFIT TO WHICH PETITIONER IS NOT ENTITLED.

The collective bargaining agreement in this case requires an employee to "have received earnings in at least twenty-five (25) workweeks in the twelve (12) months immediately preceding the current December 31st" (App.,p.52) in order to be entitled to vacation benefits for that year. The court of appeals, after examining the contract, determined "that the terms of the collective bargaining agreement require twenty-five full workweeks, and Foster's failure to substantially comply in this case, precludes his claim to full vacation benefits" (Pet.App.A,p.17A). Petitioner apparently does not contest the Court's finding; rather, it merely asserts that *Accardi, supra*, 383 U.S. 225, prohibits an effective analysis of the contract. Petitioner has obviously misunderstood the *Accardi* decision.

As already noted, the lesson of *Accardi* is that the courts must analyze the substance, effect, and intent of the vacation entitlement provision in the context of the entire collective bargaining agreement. It is well established that courts possess the knowledge and authority to do so. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

In contrast, Petitioner would have this Court limit contractual analysis to a contorted, superficial, and rigid reading of the vacations provision alone. He would require the courts to regard a benefit as a perquisite of seniority so long as any interpretation, no matter how distorted and unrealistic,

would allow an employee to receive benefits without meeting the intended earnings prerequisites. Such a ruling would clearly obfuscate this Court's determination of the Act's nature and intent. As the court below so aptly stated:

> [I]t certainly would be ironic for the Supreme Court to direct lower courts to abandon the use of labels when deciding whether a benefit is a perquisite of seniority and at the same time direct that they replace such use with a strained and niggardly analysis of the terms of collective bargaining agreements. Pet.App.A, p.64.

Petitioner's additional concern that a thorough analysis of the contract is prejudicial to the veteran because he is unrepresented at the bargaining table also lacks merit.[24] Unions are under a duty to fairly represent all employees, including veterans. *Vaca v. Sipes*, 386 U.S. 171 (1967). Furthermore, it is commonly acknowledged that many collective bargaining agreements grant the veterans greater rights and privileges than those accorded him by the Act.[25]

Even a cursory reading of the collective bargaining agreement undeniably evidences that the "bizarre results possible" in *Accardi, supra*, 383 U.S. at 230, could not occur herein. The contractual prerequisite that an employee receive earnings in twenty-five workweeks before vacation benefits accrue is a substantial one; it requires twenty-five full weeks of work. Thus, if an employee were continually absent and worked only one hour per week for twenty-five weeks, as Petitioner hypothesizes (Brief for Petitioner at 21), he would not receive vacation pay.

---

24 It should be noted that it was neither alleged nor is it indicated by the record that Petitioner in this case was unfairly represented in negotitations.

25 "Veterans Reemployment Rights Handbook", U.S. Department of Labor, Labor-Management Services Administration, 1970, p.85; Oswald & Smyth, *The Veteran Returns to the Job*, 76 Am. Fed. 19 at 21,23 (Oct. 1969).

An employee who worked substantially less than the number of hours customarily regarded as constituting a full workweek for any period of time would clearly be discharged under the terms of the collective bargaining agreement. Article VI, Section I of the agreement in issue makes it clear that an employee can be discharged for proper cause (App.,p.29). The record in the district court establishes that frequent failure to report for work constitutes proper cause for discharge (App.,pp.66,67).

Furthermore, the collective bargaining agreement reveals a strong concern on the part of Respondent that all employees report to work regularly. Article X, Section 7(e) (App.,p.46) provides the stern punishment of loss of seniority when an employee is absent for five days without excuse. Thus the employer does not tolerate frequent absenteeism.

A crucial test in the determination that a benefit represents compensation for work performed is whether the contract grants overtime credit. *Palmarozzo v. Coca-Cola Bottling Co.*, 490 F.2d 586 at 591 n.4 (2nd Cir. 1973). Article IV, Section 3 of the collective bargaining agreement in the present case (App.,p.52) satisfies that test by providing:

> Where an eligible employee has worked a six (6)-day week for not less than thirteen (13) nor more than twenty-five (25) weeks during said twelve (12) months, he shall be granted an additional four (4) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.
>
> Where an eligible employee has worked a six (6)-day week for twenty-six (26) or more weeks during said twelve (12) months, he shall be granted an additional eight (8) hours with pay at his base hourly rate at the time he receives his vacation pay for each week of vacation to which he is otherwise entitled.

Not only does an employee gain additional vacation benefits as a result of working overtime, but the benefits increase in proportion to the amount of overtime worked. Hence the vacation benefits provided by Respondent are directly related to the work performed by the employee.

One must therefore conclude that the vacation pay provided by Respondent is deferred compensation and that, to be eligible to receive vacation pay, an employee is substantially required to perform labor for twenty-five workweeks. Petitioner, however, was in the military for approximately nine months of each of the years in question and was not working for the Employer. To allow Petitioner to nevertheless accrue vacation benefits would thus be inconsistent with the concept and nature of an earned vacation.

Hence, Section 459(c) of the Act may not be construed as obligating the Respondent to confer vacation benefits upon the Petitioner unless the collective bargaining agreement grants those benefits to employees on non-military leave. The record is clear that the collective bargaining agreement makes no such grant. Petitioner is not entitled to receive vacation pay for the years 1967 and 1968.

III PETITIONER IS NOT ENTITLED TO A PRO RATA SHARE OF HIS VACATION BENEFITS FOR 1967 AND 1968, NOR IS THE ISSUE OF PETITIONER'S RIGHT TO PRO RATA BENEFITS PROPERLY BEFORE THIS COURT

Petitioner argues that if it is herein determined that the right to vacation benefits does not constitute a perquisite of seniority, Petitioner is nevertheless statutorily entitled to a pro rata share of his vacation benefits for the years 1967 and 1968. However, the issue of Petitioner's right to pro rata benefits is not properly before this Court.

The Complaint in this case (App., p.3) contains no averment relating to pro rata benefits nor was the question of pro rata relief litigated at the trial level. In fact, the record in the district court establishes that the issue was specifically excluded from determination (App., p. 10). The only reference to pro rata benefits in the district court was in the form of a settlement offer proffered by the district court judge. In view of these circumstances the court of appeals remanded the case to the district court for a determination of whether the question of pro rata relief was properly raised below and, if so, to decide the question on the merits. Thus the issue of Petitioner's right to pro rata benefits has never been litigated, nor is it clear whether it was ever properly raised.

This Court has long recognized that unless there are exceptional circumstances, it may consider only those questions which were definitively raised and litigated below. *Blair v. Oesterlein Co.*, 275 U.S. 220 (1932); *McGrath v. Manufacturer's Trust Co.*, 338 U.S. 241 (1949). As there are clearly no exceptional circumstances in this case, Respondent respectfully submits that the Court must decline the question of pro rata eligibility.

However, assuming *arguendo* that this Court determines to consider the issue, Respondent asserts that Petitioner is not statutorily entitled to pro rata relief. As already noted, Congress did not intend in passing the Act to create new rights and benefits for the returning veteran. It intended instead to preserve those benefits accorded by the collective bargaining agreement. *Fishgold v. Sullivan Drydock & Repair Corp., supra*, 328 U.S. at 288. Accordingly, there is no statutory right to any benefit which is not found in the contract. Petitioner is thus decidedly in error when he argues that the right to pro rata benefits is granted by the Act alone.

Petitioner's agrument in support of pro rata benefits lacks logic. He acknowledges, for purposes of his argument,

that vacation entitlement is not a perquisite of seniority. Based on this assumption, the seniority provisions of the Act are inapplicable and the veteran is entitled to pro rata benefits only if they are one of the "other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence." 50 U.S.C. App. §459(c)(1). Petitioner, however, asserts that the Court must ignore the other benefits language of the Act. Thus, there is obviously no basis upon which this Court can grant the Petitioner's requested alternate relief. A returning veteran is not statutorily entitled to pro rata vacation benefits.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT H. SHOOP, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219
Attorneys for Respondent

JAY A. ERSTLING
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

CLYDE H. SLEASE, *General Counsel*
DRAVO CORPORATION
One Oliver Plaza
Pittsburgh, Pennsylvania 15222